

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

ANTHONY DUNN, et al., ) No. 1:16-MD-02695-JB-LF  
)  
Plaintiffs, )  
) Vermejo Courtroom  
v. ) Albuquerque, New Mexico  
) May 24, 2016  
SANTA FE NATURAL TOBACCO ) 10:00 a.m.  
COMPANY, INC., et al., )  
)  
Defendants. )  
-----)

TRANSCRIPT OF SCHEDULING CONFERENCE

Before the Honorable James O. Browning  
United States District Judge

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1 (In session at 10:03 a.m.)

2 THE COURT: Please be seated.

3 Good morning, everyone.

4 COUNSEL: Good morning, Your Honor.

5 THE COURT: I appreciate everyone making  
6 themselves available to me today.

7 All right. The Court will call In Re  
8 Santa Fe Natural Tobacco Company Marketing and Sales  
9 Practices and Products Liability Litigation.

10 If counsel will enter their appearances.  
11 Let's start with -- I'll have counsel enter their  
12 appearances by case here, so let's start with Dunn,  
13 15-1142.

14 MS. MELISSA WOLCHANSKY: Good morning.  
15 Melissa Wolchansky, Halunen Law, Minneapolis,  
16 Minnesota.

17 THE COURT: All right. And Ms. Wolchansky,  
18 good morning to you. And you've got Ms. Boyle on the  
19 telephone?

20 MS. WOLCHANSKY: That's correct.

21 THE COURT: All right. Good morning to  
22 you, Ms. Boyle.

23 All right. Who else?

24 MS. AMY BOYLE: Good morning, Judge.

25 THE COURT: Who else on the phone for the

1 Dunn case? Mr. LaDuca?

2 MR. CHARLES LaDUCA: Good morning, Your  
3 Honor. May it please the Court. This is Charles  
4 LaDuca and my colleague Brendan Thompson both on the  
5 phone this morning for the Cuneo, Gilbert & LaDuca  
6 firm.

7 THE COURT: All right. Mr. LaDuca,  
8 Mr. Thompson, good morning to you.

9 And Mr. Reese, are you there?

10 MR. MICHAEL REESE: I am, Your Honor. Good  
11 morning, Your Honor.

12 THE COURT: Mr. Reese, good morning to you.  
13 Mr. Koluncich.

14 MR. NICHOLAS KOLUNCICH: Good morning, Your  
15 Honor.

16 THE COURT: Good morning to you.

17 MR. KOLUNCICH: Nicholas Koluncich on  
18 behalf of Plaintiff Dunn.

19 THE COURT: All right. Mr. Koluncich, good  
20 morning to you.

21 All right. Let's talk the Haksal, et al.,  
22 05-1163. Let's do local counsel first on that.

23 MR. JOHN BIENVENU: John Bienvenu. Good  
24 morning, Your Honor. John Bienvenu of the Bienvenu,  
25 Rothstein, Donatelli law firm on behalf of the

1 plaintiffs.

2 MR. RONALD MARRON: And Ronald Marron on  
3 behalf of the plaintiffs. I also have Mike -- Mike  
4 Houchin on the telephone, Your Honor.

5 THE COURT: All right. Mr. Bienvenu, --

6 MR. MICHAEL HOUCHIN: Good morning, Your  
7 Honor.

8 THE COURT: -- Mr. Marron, good morning to  
9 you. Mr. Houchin, good morning to you.

10 White case, 16-0209, Mr. Warshaw.

11 MR. DANIEL WARSHAW: Good morning. Daniel  
12 Warshaw and Alexander Safyan, Pearson, Simon &  
13 Warshaw, in Los Angeles, Your Honor.

14 THE COURT: All right. Good morning to  
15 you, Mr. Warshaw.

16 And Ms. Anderson.

17 MS. ERIKA ANDERSON: Your Honor, Erika  
18 Anderson with the Law Offices of Erika E. Anderson.

19 THE COURT: All right. Ms. Anderson, good  
20 morning to you.

21 The LeCompte case, 16-221. Is Ms. Long  
22 here?

23 MS. NANCY LONG: Yes, Your Honor. Nancy  
24 Long on behalf of the plaintiff.

25 THE COURT: All right.

1 MR. CALEB MARKER: Caleb Marker, Zimmerman  
2 Reed, on behalf of the plaintiff. Also, on the  
3 telephone is my partner, Hart Robinovitch.

4 THE COURT: All right. Good morning.

5 MR. HART ROBINOVITCH: And Hart Robinovitch  
6 on the telephone from Zimmerman Reed in Scottsdale,  
7 Arizona.

8 THE COURT: All right. Good morning to  
9 you.

10 And the Rothman case, 16-0294. It's again  
11 you, Ms. Long. And Mr. Marker, are you there?

12 MR. MARKER: Yes, Your Honor.

13 MR. GREG BLANKINSHIP: Your Honor, I think  
14 there's a little confusion about --

15 THE COURT: Okay.

16 MR. BLANKINSHIP: -- who represents the  
17 plaintiff in the Rothman -- my name is Greg  
18 Blankinship from Finkelstein, Blankinship,  
19 Frei-Pearson & Garber.

20 THE COURT: Okay.

21 MR. BLANKINSHIP: I'm here for the  
22 plaintiff.

23 THE COURT: All right. All right. Anybody  
24 else in the Rothman case?

25 All right. Sproule, et al., 16-296.

1 MR. SCOTT SCHLESINGER: Scott Schlesinger,  
2 Your Honor. Good morning.

3 THE COURT: Mr. Schlesinger, good morning  
4 to you.

5 And for -- nobody from the Brattain case,  
6 16-300.

7 Grandison, et al., 16-319.

8 MR. BLANKINSHIP: Your Honor, I'm also  
9 representing the Grandison plaintiffs. Greg  
10 Blankinship from Finkelstein, Blankinship.

11 THE COURT: Mr. Blankinship, good morning  
12 to you.

13 And the Cuebas case.

14 MS. GRETCHEN ELSNER: And Your Honor, on  
15 Grandison, I'm Gretchen Elsner, Elsner Law & Policy.

16 THE COURT: Ms. Elsner, good morning to  
17 you.

18 Cuebas case, 16-320. Again, that's yours,  
19 Mr. Schlesinger.

20 MR. SCHLESINGER: Yes, sir.

21 THE COURT: And then the Okstad, et al.,  
22 16-323.

23 MR. SCHLESINGER: Also mine.

24 THE COURT: All right. Mr. Schlesinger and  
25 Ms. McGinn, good morning to you.

1 MS. RANDI MCGINN: Good morning, Judge.

2 THE COURT: And the Waldo case, 16-234.

3 Ms. Glassman, are you there?

4 MS. MARISA GLASSMAN: Yes. Hi, Your Honor.

5 THE COURT: Good morning to you.

6 And Mr. Yanchunis?

7 MR. JOHN YANCHUNIS: Yes, Your Honor, John  
8 Yanchunis. Good morning.

9 THE COURT: Good morning to you,  
10 Mr. Yanchunis.

11 And then the Ruggiero case, 16-329. That's  
12 yours as well, Mr. Yanchunis?

13 MR. YANCHUNIS: Yes, Your Honor.

14 THE COURT: Okay. And then Gudmundson,  
15 16-383, we don't have anybody for that.

16 And our newest case, we don't have a number  
17 assigned to it yet from Florida Southern. Matt  
18 Schultz, are you --

19 MR. MATTHEW SCHULTZ: Yes, Your Honor.  
20 Matt Schultz, Levin, Papantonio, from Pensacola,  
21 Florida, and we also have counsel from the Searcy  
22 firm on that case.

23 THE COURT: All right.

24 MS. KELLY HYMAN: Kelly Hyman. Good  
25 morning, Your Honor.



1 THE COURT: All right. Mr. Schultz,  
2 Ms. Hyman, good morning to you.

3 And then for the defendants, local counsel?  
4 Anybody local? Oh.

5 MR. ANDREW SCHULTZ: Your Honor, Andrew  
6 Schultz from the Rodey firm --

7 THE COURT: All right.

8 MR. A. SCHULTZ: -- for the defendant.

9 THE COURT: Mr. Schultz, good morning to  
10 you.

11 From Jones Day?

12 MR. DAVID MONDE: Judge, David Monde from  
13 Jones Day. Good morning.

14 THE COURT: Mr. Monde, good morning to you.

15 MS. SHARYL REISMAN: Good morning, Your  
16 Honor. Sharyl Reisman, Jones Day.

17 THE COURT: All right. Ms. Reisman, good  
18 morning to you.

19 MR. PETER BIERSTEKER: And Peter. The last  
20 name is Biersteker.

21 THE COURT: Mr. Biersteker.

22 MR. BIERSTEKER: Also with Jones Day.

23 THE COURT: Good morning to you.

24 MR. BIERSTEKER: Thank you.

25 THE COURT: All right. Well, I've joi --

1 I've read your Joint Preliminary Report, the  
2 Disclosure Statement by Reynolds, and then also the  
3 Joint Application for Appointment of Plaintiffs'  
4 Leadership Structure, and then, of course, the Joint  
5 Status Report and Provisional Discovery Plan. Where  
6 you agree, I don't have any problems. You do have  
7 some disagreements. I do have some thoughts but  
8 would like to hear your comments first.

9 Is there anything else you'd like to tell  
10 the case -- the Court about the case that might  
11 impact scheduling or how we're going to handle  
12 matters?

13 I'll start with you, Ms. McGinn.

14 MS. MCGINN: Yes, Judge. Judge, I'm the  
15 proposed liaison counsel for the plaintiffs. As you  
16 can tell, the good news in this excellent MDL  
17 adventure is that we've agreed and don't have to  
18 fight over who are going to be in leadership  
19 positions. I think I just wanted to just give the  
20 Court a brief overview of our thinking behind the  
21 leadership structure.

22 This case is an interesting mash-up between  
23 tobacco law and consumer misrepresentation law  
24 around, can something that can kill you ever be  
25 advertised as a healthier option? That's kind of

1 what we're going to be looking at in this particular  
2 case, and so we've put together a team that has  
3 strengths from both of those areas of law, both  
4 people who've done lots of tobacco litigation, and  
5 then also people on the consumer misrepresentation  
6 side, particularly for misrepresentations of things  
7 such as natural or organic.

8 And so that's how we've selected the  
9 leadership team, is to put people with those  
10 strengths on all the committees and on all the  
11 groups. And that's why we have proposed co-lead  
12 counsels, who I just want to introduce you to, and  
13 then I'll let you decide if you want to hear from  
14 them.

15 Scott Schlesinger is probably one of the  
16 premier tobacco litigators in the country. He and  
17 his father have taken on the tobacco industry for  
18 years, and he has hundreds of plaintiffs in the Engle  
19 versus Liggett case there in Florida. He will be  
20 trial counsel, and I hope I get to try the case with  
21 him here in New Mexico. He is able to give the Court  
22 maybe a five-minute overview of tobacco litigation  
23 and what he thinks the issues will end up being in  
24 this case.

25 John Yanchunis, he's with the Morgan &

1 Morgan Complex Litigation Group. As you can tell,  
2 all of these people are eminently qualified. He's  
3 been co-lead counsel on a number of cases around the  
4 country. He will be willing to talk to you about the  
5 process and how the leadership structure will work,  
6 if you want more details about that.

7 And then Melissa Wolchansky, of the Halunen  
8 Law Firm, they do all complex consumer litigation.  
9 That's the consumer side, particularly involving  
10 cases where their products are being represented as  
11 natural products, as is happening in this particular  
12 case. And she can -- she's the one that's been  
13 designated to talk to you about scheduling, and if  
14 you have any questions about the law, she can talk to  
15 you about that, too.

16 So who would you like to start with, Judge?

17 THE COURT: Are we taking up, then, the  
18 joint application for appointment of counsel first?  
19 Is that what you'd like to do?

20 MS. MCGINN: That would be great, Judge,  
21 yes.

22 THE COURT: All right. Well, whatever  
23 you'd like, however you'd like to present it, then.

24 MS. MCGINN: Okay. Why don't I have  
25 Mr. Schlesinger give a brief overview of, sort of,

1 what the issues are in the case, and then  
2 Mr. Yanchunis can come tell you about our  
3 application.

4 THE COURT: All right. Mr. Schlesinger.

5 MR. SCHLESINGER: May it please the Court.

6 THE COURT: Mr. Schlesinger.

7 MS. MCGINN: We've picked lead counsel  
8 based on the most difficult names for the Court to  
9 pronounce. I just want to let Your Honor know that.

10 THE COURT: Thank you.

11 MR. SCHLESINGER: Good morning, Judge.

12 THE COURT: Mr. Schlesinger.

13 MR. SCHLESINGER: The -- the -- this -- the  
14 litigation, I think a little history of tobacco can  
15 give the Court an overview, because sometimes tobacco  
16 gets lumped in with food. But tobacco is not food,  
17 and it's recently been put under the penumbra of FDA  
18 regulation.

19 But there's a vexatious history of various  
20 entities, organizations, and plaintiffs trying to  
21 regulate, control, or impact this particular brand of  
22 cigarettes, the Natural American Spirit 100 percent  
23 additive-free, organic tobacco cigarette. The first  
24 bit of business that I would offer to Your Honor is  
25 that, based on litigation that's preceded us, we've

1 discovered through litigation repositories of  
2 extensive materials what was once the internal secret  
3 documents of the tobacco industry.

4 In no uncertain terms, they characterize  
5 their product as a nicotine delivery device. They  
6 say specifically in their once internal documents  
7 that cigarettes are not the product. The cigarette  
8 is the package, and the -- the package, the highly  
9 engineered unit that is a cigarette is only for one  
10 purpose, and that is to deliver a unit dose of  
11 nicotine, which is an addictive drug, and that's why  
12 people smoke.

13 When the first knowledge of tobacco harm  
14 started to become prominent in the '50s, Tobacco  
15 embarked upon a campaign to create doubt about the  
16 health effects of tobacco and also to reassure the  
17 public with alternative designs that would imply,  
18 without specifically promising, health benefits.  
19 That was known as the Health Reassurance Campaign.  
20 It started with filters.

21 There never used to be filters on  
22 cigarettes. Filters were and always were an  
23 effective marketing gimmick, but they were internally  
24 described by the tobacco industry as the  
25 psychological crutch that would keep folks smoking,

1 for folks that have concerns about health when the  
2 news came out before the Surgeon General's report  
3 that cigarettes caused cancer.

4 So what we've got today now is the 20 --  
5 what we propose to prove in this case is we have the  
6 classic example of the 21st century health  
7 reassurance in the modern form of referring to things  
8 as "organic" and "all natural." State attorneys  
9 general have come after Tobacco on this and made  
10 arrangements to add some additional voluntary  
11 labeling on these packages of cigarettes called  
12 "organic."

13 The FTC, in 2000, came after American  
14 Spirit, and there was some additional labeling, which  
15 we suggest is a little confusing, because the  
16 prominent word is "safer." And more --

17 THE COURT: Are any other manufacturers,  
18 other than Santa Fe Natural, doing this?

19 MR. SCHLESINGER: As a matter of fact,  
20 Winston cigarettes, for some period of time, had a  
21 "no bull" campaign, meaning no bull, no additives,  
22 and they used those terms as well. Imperial Tobacco  
23 of Britain has bought the Winston brand in the merger  
24 that Reynolds undertook to buy Lorillard and acquire  
25 the Newport brand.

1           They disposed of some of their lesser  
2 brands like Winston, which is sort of a downsloping  
3 brand. They disposed of it to Imperial Tobacco, a  
4 British company that now has some market share, the  
5 idea being to get by FTC concerns about consolidation  
6 and antitrust.

7           That's a little bit of a side story, but it  
8 brings up an important point that Your Honor may want  
9 to consider. And some of the facts we'll put in  
10 evidence in this case is that historically -- and  
11 since the FDA act has come in over the last many  
12 years, tobacco consumption per capita in the United  
13 States has dropped very considerably and is often,  
14 the last several years, 17 percent. However, there's  
15 still 45 to 50 million smokers in the United States.

16           But -- and this is quite an anomaly and can  
17 only be explained in one way, and that is because of  
18 the -- and there's extensive peer review research out  
19 on this, that folks smoke these cigarettes because  
20 they think they're healthier and safer and perhaps  
21 will help them quit and are particularly attractive  
22 to young people.

23           But the -- the fact is that American Spirit  
24 is the only brand of cigarettes in the United States  
25 that is a -- essentially, a meteoric growth brand.



1 American Spirit cigarettes are now up 25 percent year  
2 over 2-14 to 2-15. They're now selling almost  
3 4.8 billion units, and that's a stick of a cigarette,  
4 so 20 sticks in a pack. They're selling 4.8 billion  
5 of these cigarettes, and they're making an  
6 incremental premium profit of a nickel a stick.

7 That's about \$250 million a year, and  
8 that's in an environment where all of the  
9 restrictions on smoking and secondhand smoke and no  
10 smoking in public places has driven the overall  
11 smoking rate down in the United States to under 20  
12 percent. Despite that, there's still 45 to  
13 50 million smokers, but the only growth brand in the  
14 United States at its meteoric growth, it's now up to  
15 about three percent of the tobacco market, which is  
16 quite successful for them, is this Natural American  
17 Spirit brand.

18 We've already -- we have -- while we don't  
19 have experts for -- you know, ready for trial, we  
20 have extensive experts who can speak about the peer  
21 review literature that shows that folks are smoking  
22 these brands because they think they're healthier and  
23 safer. And it harkens back to the '50s, which was  
24 the filters, what we call the "filter fraud," which  
25 many courts have found to be a filter fraud, the

1 Health Reassurance Campaign.

2 Subsequently in the '70s and '80, they  
3 moved to light cigarettes, and the word of the -- the  
4 word of that generation was "lights." And lights  
5 were a reassurance brand, and they were for the  
6 health-conscious consumer. And now, we have the  
7 youngsters, the hipsters, the Brooklyn hipsters, the  
8 San Francisco folks that are driving this great rise  
9 in cigarettes.

10 And it's -- you know, you can do anecdotal  
11 surveys. You can do surveys of our clients that have  
12 called us. But you can go to the peer review  
13 literature in the Journals of Tobacco Control,  
14 Society for Research on Nicotine and Tobacco, and  
15 constantly, there's studies and research coming out  
16 that definitively indicate that the brand is  
17 successful because of the words "natural,"  
18 "additive-free," and "organic."

19 And I've put on the screen here, just to  
20 cut to the chase and not bury the lead, that the  
21 basic contradiction in terms to call -- this is a  
22 pack of American Spirit cigarettes. They call it  
23 100 percent additive-free natural tobacco on the  
24 front. On the back, if you'll look at the bottom  
25 there, it's menthol, menthol, mellow menthol taste,

1 menthol mellow taste.

2           Menthol is an additive, and one of the  
3 fellows that can talk extensively about this and we  
4 hope to depose is a guy named James Swauger, who is  
5 the vice president of their regulatory affairs. And  
6 I've deposed some of his underlings over the years.

7           We talk about menthol. Menthol is  
8 determined by the FDA to be an additive in tobacco.  
9 It makes it more addictive. It makes it hard to  
10 quit. And most importantly and in concert with this,  
11 it gets young people smoking, because nicotine  
12 addiction is considered by all medical societies to  
13 be a disease of adolescence. It is the pediatric and  
14 adolescent brain that is exquisitely sensitive to  
15 exposure to nicotine and starts the process of  
16 addiction.

17           There is no smoking -- less than five  
18 percent of all smoking begins after the age of 21.  
19 The target market are 12 to 16 year olds. And this  
20 health reassurance brand is very popular among young  
21 people, and it is a continuation, what we say, of  
22 what's been found to be the health reassurance fraud  
23 going back to the -- to the '50s.

24           Interestingly, and something that isn't in  
25 any of your papers but I think will be relevant to

1 these proceedings, is that Judge Kessler, a federal  
2 judge in -- in D.C., presided over the large case  
3 that went through two presidential administrations,  
4 both the Clinton and the Bush administration, whereby  
5 a RICO charge was levied by the Department of Justice  
6 against the combined manufacturers, including  
7 Reynolds, who now owns, as a wholly owned subsidiary,  
8 American Spirit.

9 And during that litigation, eventually, in  
10 2006, Judge Kessler issued her order, which had some  
11 prohibitive findings. It was not monetary, but there  
12 was injunctive release, but -- relief. Excuse me.  
13 But she specifically said that all defendants -- and  
14 when she talked about defendants, she talked about  
15 Reynolds and their assigns and their successors, of  
16 which American Spirit is one. She specifically said  
17 that forbidden health descriptors include the words  
18 "low tar," "light," "ultra light," "mild," and  
19 "natural."

20 And there was a time when the light  
21 cigarettes were considered to be implied health  
22 reassurance. They've been banned. Cigarettes can no  
23 longer contain that language. However, to some  
24 extent, time is always of the essence with these  
25 types of litigation, because to this day, the three

1 different color packs of cigarettes -- the Marlboro  
2 lights, the Marlboro ultra lights and the Marlboro  
3 regulars -- come in red, gold, and silver.

4 And the color-coding has been proven to  
5 still let folks know that these cigarettes are the  
6 brands that are known as lights or ultra lights, and  
7 they're still asked for by name. And if you go to  
8 any convenience store anywhere in America and ask for  
9 a pack of Marlboro lights, they're going to hand you  
10 the pack. If you ask for a pack of Marlboro silvers,  
11 they're going to hand you the silver pack.

12 And extensive study has gone on to show  
13 that, even when the words "lights" were taken off,  
14 the marketing, the branding, the long history of the  
15 way in which Tobacco is positioned endured even after  
16 some of the descriptors were removed. And perhaps if  
17 this case takes too long to resolve, the same could  
18 be true of Natural American Spirit. Folks would  
19 still know it was natural or additive-free or  
20 organic, even though it's got menthol and things like  
21 that, even after some of these descriptors were  
22 removed.

23 The FDA is trying to remove those  
24 descriptors. They've warned them. They're in  
25 negotiations right now as to what to do, because the

1 FDA proceedings -- and this really does give some  
2 support to our positions. The FDA perceives that the  
3 Natural American Spirit cigarette is the equivalent  
4 of a modified-risk tobacco product, meaning that the  
5 claims imply it's healthier and safer.

6 And therefore, it has not gone through the  
7 rigorous scientific process at the FDA required for  
8 the FDA to give them permission to characterize a  
9 product as modified or lowered risk. It has to show,  
10 through true scientific benefit, that it is.

11 Now, here's an ironic and very unfortunate  
12 truth about these cigarettes. Not only are they not  
13 safer, not only are they not healthier, not only are  
14 they not a lower risk, but in fact, they are the most  
15 carcinogenic cigarettes in the country. Recent peer  
16 reviewed studies have demonstrated that the number  
17 one most cancerous cigarette in the country is the  
18 Natural American Spirit. I think it's the blue 100's  
19 pack or the blue pack. It was the top of the list in  
20 terms of nitrosamines and other cancer-causing  
21 chemicals.

22 So our position is that they've -- they've  
23 got excess profits to disgorge because they've been  
24 able to charge a premium. They've got additional  
25 profits to disgorge because this is also known as a

1 quitting interrupter.

2           The folks are always also studied. The  
3 smokers study. They're like they're going to smoke  
4 these because it will help them quit. There's a  
5 perception that the additives enhance addiction, and  
6 they do. In the regular cigarettes that are made  
7 with ammonium diphosphate, that drug, that additive  
8 freebases or crack -- crack -- it's crack nicotine,  
9 and it speeds delivery of nicotine with lesser  
10 amounts of tobacco to the brain.

11           So folks have come to think that additives  
12 make things worse. Part of the people that switch to  
13 these brands or smoke these brands believe that they  
14 do so to quit, and the concept, the internal secret  
15 concept developed by Tobacco of interrupting quitters  
16 is another reason why they've earned excess profits.

17           I think that gives you a little bit of an  
18 overview. It's hard to bombard you with 50 or 60 or  
19 a hundred years of tobacco engineering and marking  
20 and what's gone on, but we propose that, classically,  
21 the American Spirit brand is the living, breathing,  
22 21st incarnation of the health reassurance fraud that  
23 has been, you know, reduced to judgments in many of  
24 the state court cases.

25           In the Judge Kessler case, she specifically

1 prohibited "natural," but they've not been able to do  
2 it. They made a deal with the FTC to put a warning,  
3 an additional warning, on the pack, which we suggest  
4 adds virtually nothing to the understanding of the  
5 pack. No additives in our tobacco does not mean a  
6 safer cigarette. It contains a double negative, and  
7 the prominent word there is "safer."

8           Nowadays, if anybody travels abroad or goes  
9 to a duty-free shop, whether it's in Atlanta or south  
10 Florida or abroad, if you're going to the Bahamas or  
11 England or anything, they have different warning  
12 systems, and the FDA's supposed to have authority as  
13 well. And you will see huge warnings that  
14 unceremoniously say two words: "Smoking kills."

15           These cigarettes don't do that, and they  
16 are -- they are very beholden to this language. This  
17 language is extremely profitable for them, and they  
18 will -- they will fight very vigorously and -- you  
19 know, to set -- to explain why it isn't safe. It  
20 isn't a more danger -- you know, it's not anything to  
21 suggest that it's -- they're implying safety. And  
22 that'll be their position in the case.

23           But I think, for an overview, that's just a  
24 little bit about the story of how we got here. We're  
25 litigating this issue and taking testimony on this



1 issue quite frequently now in front of the many state  
2 court judges and federal court judges in Florida that  
3 are listening to the Engle progeny case, which is a  
4 decertified class action.

5 But when it comes to the punitive damage  
6 phase of those trials and the concepts of  
7 reprehensibility and whether Tobacco has mitigated or  
8 changed their ways, American Spirit and its ongoing  
9 health reassurance figures prominently in those -- in  
10 that exposition in the evidence.

11 I've tried cases with Mr. Biersteker here.  
12 He's -- we've been on either side of this issue.  
13 We've litigated this issue. It's interesting that it  
14 actually was years ago. I was actually in New Mexico  
15 and had a lengthy trial with the Rodey firm many  
16 years ago.

17 So I have a little familiarity with the  
18 folks involved, and I look forward to being a  
19 participant in this case. If there's any questions  
20 Your Honor wishes to pose to me, I'm happy to hear  
21 them, but I thank you for letting me lay it out for  
22 you a little bit.

23 THE COURT: All right. Thank you,  
24 Mr. Schlesinger.

25 MR. SCHLESINGER: Thank you, sir.

1 THE COURT: Mr. Yanchunis, are you going to  
2 elaborate?

3 MR. YANCHUNIS: Thank you, Your Honor.

4 THE COURT: Mr. Yanchunis.

5 MR. YANCHUNIS: As sometimes happens in  
6 litigation, there are a number, obviously, as you  
7 know, cases filed around the country and in New  
8 Mexico against the defendants in this case. And the  
9 Court asked us to come up with a leadership  
10 structure. I've had the benefit, perhaps because of  
11 the years of practice, of ascending to the leadership  
12 in a number of much larger multidistrict litigation  
13 cases than this, and one of the things that we did  
14 was we first met by phone and then met in person in  
15 Albuquerque to come up with a consensus of leadership  
16 structure rather than have what can be and what  
17 occasionally is a challenge for the Court, and that  
18 is to pick between competing slates.

19 What we've done is come up with a consensus  
20 slate that I believe utilizes the resources, talents,  
21 and experience of lawyers in the tobacco arena as  
22 well as in the consumer class action arena. My firm  
23 happens to have both because we're based in Florida.  
24 We have Engle cases, but I run the firm's class  
25 action practice.

1           We also ensured that we had diversity, and  
2   you know, we have a co-lead -- a three-co-lead  
3   structure that is not only aggressive, and we do have  
4   diversity with Ms. Wolchansky as a co-lead.

5           One of the things that a court -- I'm sure  
6   you're very concerned about is duplication of effort.  
7   We've proposed a billing protocol which we've  
8   distributed to every lawyer in the case. We'll  
9   demand that time be kept by increments of tenths  
10   of -- or six minutes, that those will be submitted to  
11   the co-leads on a monthly basis. If the Court would  
12   want those to be submitted in chambers, that can be  
13   accomplished.

14           I presently co-lead in a case before Judge  
15   Thrash, the chief judge in the Northern District of  
16   Georgia. It's a much larger case, probably  
17   110 million people, involving the Home Depot data  
18   breach litigation. Judge Thrash wanted those time  
19   records submitted.

20           I spent last Friday with the other co-leads  
21   going through everybody's submission, because we did  
22   settle that case. And we were reviewing, again, to  
23   make certain that, along with our monthly task of  
24   ensuring that people were properly focused and  
25   properly working on the things that were assigned to

1 them and not things that weren't. We went through  
2 those submissions, again, before our fee application  
3 is due later this month in that case.

4 One of the things we've done, as the Court  
5 has seen in our applications, is created a committee  
6 structure so that lawyers are properly tasked, within  
7 their experience and talents, to work on certain  
8 aspects of the case: Pleading client vetting,  
9 research trial experts, discovery. And we've  
10 assigned people to those committees so that there's  
11 not overlapping of work and that only lawyers who  
12 will undertake tasks will do so at the request of the  
13 three co-leads. It is a -- certainly a large  
14 committee, but it's one in which I think the size of  
15 this case and the demands of the litigation  
16 facilitate.

17 The Court asked for a building structure.  
18 Obviously, if this results in a common fund, we  
19 proposed a 25 to 30 percent range to the common fund.  
20 However, the case also -- courts do require sometimes  
21 a cross-check. That's the reason we have -- require  
22 detailed billing records. Most of the consumer  
23 statutes that are in play in this case that may come  
24 up in the amended consolidated complaint -- which, of  
25 course, we've asked the Court to give us until

1 August 22nd to file -- have fee entitlements  
2 statutes.

3 Some states, such as my own state, Florida,  
4 is on the lodestar approach with a multiplier and not  
5 the common fund. Other states not -- don't follow  
6 that approach. But that's kind of an overview.

7 THE COURT: Have you -- have you had cases  
8 before where you've had three co-leads?

9 MR. YANCHUNIS: I have -- in the case I was  
10 talking about, the Home Depot litigation, we have  
11 three co-leads, and then the former governor of  
12 Georgia, Roy Barnes, is our liaison and is a  
13 presumptive lead. So in actuality, we have four  
14 co-leads.

15 In the DirecTV NFL -- God bless you --  
16 there are -- just approved by the court, there are  
17 four co-leads in that case. In the -- so, yes, I've  
18 personally experienced a three-co-lead structure, and  
19 again, in Home Depot, it's almost four, because we've  
20 given that power to judge -- to Governor Barnes to --

21 THE COURT: Do you see any downside to  
22 four -- three, rather than just a single one?

23 MR. YANCHUNIS: I -- I don't. Again, I  
24 have -- I've found that, in working with multiple  
25 co-leads, we work together. We don't duplicate work,

1 and effectively, that -- that's the upper management  
2 of the case. Again, this is one in which there's a  
3 marriage of tobacco issues and consumer mislabeling  
4 issues, and I think what we've done is create a  
5 three-co-lead structure which draws upon all of those  
6 talents.

7 THE COURT: Have you worked with your  
8 co-leads before?

9 MR. YANCHUNIS: My law firm has. I've not  
10 personally worked with Mr. Schlesinger. My law firm  
11 has a substantial working relationship with him and  
12 his law firm. I've not worked with Ms. Wolchansky at  
13 the co-lead level, but in our time up until now, I  
14 can work with all of them. I have a very -- I have a  
15 career both in the law, in the professional bar, as  
16 well as my committee work in my community of being a  
17 facilitator of visions or divisions and in  
18 facilitating compromise.

19 I'm a professional mediator, and I do that  
20 when I have the time, and I can work with both my  
21 co-leads. I have a tremendous amount of experience  
22 with a number of the committee members in other  
23 cases, not every single one of them, but in a number  
24 of them. Because typically, in the class action  
25 world, we -- we come together in cases like this and,

1 when possible, work with consensus slates.

2 THE COURT: All right. Anything else,  
3 Mr. Yanchunis?

4 MR. YANCHUNIS: Your Honor, I would be  
5 happy to answer any questions in that regard. If you  
6 have none, then I'll sit down.

7 THE COURT: I think that's all I have at  
8 the present time.

9 MR. YANCHUNIS: Thank you, Judge.

10 THE COURT: Thank you, Mr. Yanchunis.

11 Anyone else want to speak?

12 Mr. -- Ms. McGinn.

13 MS. MCGINN: I think that's it for now,  
14 Judge, until you get to the scheduling, to the  
15 scheduling order.

16 THE COURT: All right.

17 MS. MCGINN: And then Ms. Wolchansky will  
18 talk about that.

19 THE COURT: All right. I'll just make  
20 sure. Everybody on the phone, anybody else want to  
21 say anything on the motion, the joint motion to --  
22 for appointment of plaintiffs' leadership structure?

23 How about on the defense side? Anybody  
24 want to speak to that?

25 MR. MONDE: Your Honor, David Monde --

1 THE COURT: Mr. Monde.

2 MR. MONDE: -- on behalf of the defense.

3 The defense takes no position regarding the proposed  
4 leadership structure, would simply observe that there  
5 are a number of people on the other committees as  
6 well, I believe nine on the executive committee, five  
7 on the local steering committee. And while we take  
8 no position on that, it certainly raises the bar in  
9 terms of efficiency for those folks to work together.  
10 I will say --

11 THE COURT: You're -- you're concerned  
12 about so many people in the leadership structure?

13 MR. MONDE: Not so much the leadership  
14 structure, sir, but the point that, if there are --  
15 is there more than one lead lawyer on that leadership  
16 committee? It puts a premium on avoiding duplication  
17 of effort, and that would be something that we will  
18 all have to confront down the road.

19 I will say --

20 THE COURT: Let me make sure I understand  
21 your concern. You're saying that, because they have  
22 three co-leaders, you're concerned about duplication?

23 MR. MONDE: And potential inefficiency. If  
24 you have three people operating as a -- as a  
25 leadership committee, there is more potential than if



1 just one lawyer is doing it to duplicate effort.  
2 Provided that the effort is not duplicated, then  
3 those concerns would be obviated.

4 I will note that we have successfully  
5 agreed with the plaintiffs on a number of points in  
6 the 26(f) joint report. In fact, we've continued  
7 those discussions this morning and have some  
8 additional agreements that are not yet reflected in  
9 the papers. That we'll get to when we get to that  
10 stage of things.

11 So again, no objection per se, but given  
12 the proposal that the plaintiffs have made, it will  
13 put a premium on them being efficient and not  
14 duplicating effort of each other.

15 THE COURT: So far, are you impressed  
16 with -- with where they are?

17 MR. MONDE: So far, I would agree that we  
18 have successfully negotiated several points of  
19 potential contention in the 26(f).

20 THE COURT: And has it been more or less  
21 difficult because you're dealing with three co-lead  
22 plaintiffs?

23 MR. MONDE: Honestly, no, not at this  
24 point, Judge.

25 THE COURT: All right. Anything else,

1 Mr. Monde?

2 MR. MONDE: Not on that point.

3 THE COURT: All right.

4 MR. MONDE: Now, Mr. Schlesinger gave a  
5 detailed background in terms of his view of the case.

6 THE COURT: Would you like to give one?

7 MR. MONDE: I would.

8 THE COURT: You may.

9 MR. MONDE: All right. And again,  
10 Mr. Schlesinger's description certainly applies to  
11 the so-called Engle litigation that's been going on  
12 in Florida for some time. Santa Fe Natural Tobacco  
13 is not a party in that litigation. The Kessler order  
14 does not address Santa Fe, and so what I'd like to  
15 take a few minutes to do is give the Court our view  
16 of what this case is about. To us, this is a  
17 straightforward product labeling claim.

18 Now, Santa Fe was founded in 1982. It  
19 first sold cigarettes using the terms "natural" and  
20 "additive-free" in 1985 under the name Original  
21 American Spirit. In 1992, they changed the brand to  
22 Natural American Spirit, continuing to use those  
23 terms, "additive-free" and "natural tobacco." And  
24 Santa Fe has used those terms to describe its tobacco  
25 on its labels and in its advertisements since then.

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1 In 2000, Santa Fe entered into a consent  
2 order with the Federal Trade Commission, and in that  
3 consent order, the commission allowed Santa Fe to  
4 continue using those terms "natural" and  
5 "additive-free tobacco" in those advertisements,  
6 provided it be accompanied with a disclaimer stating  
7 that no additives in our tobacco does not mean a  
8 safer cigarette, the very thing that is in front of  
9 the Court on the monitor.

10 Santa Fe, in addition, voluntarily added  
11 that disclaimer to its labeling. In other words, the  
12 FTC order was to advertising only. Santa Fe  
13 voluntarily added it to the label. Reynolds did not  
14 acquire Santa Fe until 2002. And the term "organic"  
15 was subject of litigation and subsequent agreement  
16 with 30 attorney generals, state attorney generals,  
17 including the New Mexico state attorney general, in  
18 2010.

19 THE COURT: Does Santa Fe have any ties to  
20 New Mexico? Does it have a plant, or what is its tie  
21 to the state?

22 MR. MONDE: It was founded in Santa Fe by  
23 three folks from New Mexico. It has an office there  
24 in Santa Fe today. The marketing and the  
25 advertising, many of the executives involved with

1 that from the founding of the company up to today --  
2 that is, even since Reynolds' acquisition -- is based  
3 in Santa Fe.

4 Now, the manufacturing of the product has  
5 been in North Carolina. That was true both before  
6 Reynolds' acquisition and after. But Santa Fe has  
7 very deep ties to the community, and that is actually  
8 part of its marketing approach and philosophy.

9 THE COURT: So if we were to go up to the  
10 office in Santa Fe, how many employees and people  
11 would we see there?

12 MR. MONDE: At least 30 directly involved  
13 in the marketing and advertising domains, and then  
14 additional employees in various support functions.  
15 And then the manufacturing, as I said, is in North  
16 Carolina.

17 Now, so the disclaimer regarding "organic";  
18 "organic" does not mean a safer cigarette. That was  
19 the result of the agreement with the state attorney  
20 generals.

21 So in our view, there are really two key  
22 factual issues to be resolved in this case. Number  
23 one, during the class period, were Santa Fe's claims  
24 that the tobacco in Natural American Spirit  
25 cigarettes was additive-free, natural, and where

1 applicable, organic, were those truthful? And our  
2 position is that they were.

3 Then the second key factual issue is  
4 whether, during the class period -- and as I've  
5 described, Natural American Spirit carried both in  
6 the advertising and on the labels the Surgeon -- both  
7 the Surgeon General warning and the disclaimers that  
8 we've talked about this morning. Would a reasonable  
9 consumer believe that the alleged implied claim of  
10 health, in the face of the express disclaimer on the  
11 label and in the advertising, that it does not mean  
12 safer, that those terms do not mean safer? Those are  
13 the two key factual issues as we see them.

14 Then there are three principal legal issues  
15 as we view the case: First, what is the legal effect  
16 of those disclaimers regarding additive-free and  
17 organic? Well, in our view, there are several.  
18 First of all, because of the FTC consent order, we  
19 believe that that preempts plaintiffs' claims, and we  
20 will be bringing a motion to dismiss, with the  
21 Court's permission, on that basis.

22 Number two, many of the state consumer  
23 protection statutes that have been alleged in the  
24 various complaints create a safe harbor, if you will,  
25 for FTC-approved claims. In other words, there's a

1 safe harbor that, under those state protection  
2 statutes, the claims are not unfair or deceptive if  
3 they are the product of an FTC-approved claim, which  
4 is what we have in this case.

5 The disclaimers also raise First Amendment  
6 issues, because First Amendment issues arise with any  
7 construction of state law that prohibits truthful  
8 commercial speech accompanied by a disclaimer  
9 disavowing any allegedly misleading implication.

10 No. 4, disclaimers first appeared in the  
11 late 1990s, even before the FTC consent order that  
12 I've described, and those disclaimers, in our view,  
13 would present substantial obstacles to plaintiffs'  
14 efforts to expand the class period beyond what we  
15 view as a -- at a maximum, a six-year class period  
16 based on the claims that have been brought to date.  
17 In other words, those disclaimers would put someone  
18 on inquiry notice regarding the -- any alleged  
19 implied claim of a health benefit.

20 And then finally, the disclaimers present  
21 significant obstacles, in our view, to showing  
22 reasonable reliance or proximate causation based on  
23 alleged implicit health claims that were expressly  
24 disclaimed.

25 That's the first legal issue as we see it.

1 The second one is focused on Reynolds American and  
2 specifically what they are doing in this case.  
3 Reynolds American, or RAI, is the parent of Santa Fe.  
4 It's a holding company. It does not manufacture any  
5 product, including Natural American Spirit  
6 cigarettes.

7 It does not advertise. It -- none of its  
8 conduct gave rise to the claims here. It does not  
9 have a continuous presence in New Mexico such that  
10 general jurisdiction would be proper. And so we plan  
11 to bring a motion to dismiss with regard -- lack of  
12 personal jurisdiction with regard to RAI.

13 THE COURT: Is there another subsidiary  
14 that does the actual manufacturing?

15 MR. MONDE: Santa Fe does its own  
16 manufacturing, but again, not here in New Mexico, but  
17 over in North Carolina.

18 THE COURT: All right.

19 MR. MONDE: Then the third key legal issue,  
20 given the claims, is obviously related to class  
21 certification and whether class certification is  
22 appropriate. And without getting into the details of  
23 that, we believe that there will be issues on a  
24 number of required elements, Commonality and  
25 predominance coming to the forefront.

1           Because for example, not all consumers who  
2 read the claims of "natural free" and -- I'm sorry,  
3 "additive-free" and "natural," not all of them would  
4 read an implied health message at all with regard to  
5 that, especially in the face of the disclaimer. And  
6 then there would be a variety of implied claims.  
7 Some people may view it as a health benefit claim  
8 implied, notwithstanding the disclaimer. Others  
9 would view the terms "natural" and "additive-free" as  
10 descriptors of the quality of the tobacco.

11           And as the Court will hear, for example,  
12 Santa Fe is produced -- and it's unique in this  
13 regard. It's produced only from whole-leaf tobacco.  
14 It does not include some of the fillers, that  
15 reconstituted tobacco, expanded tobacco, some of the  
16 other things that are typically seen in cigarettes.  
17 Santa Fe is unique in that regard.

18           Some people also view those descriptors as  
19 describing a better-tasting product, and we believe  
20 that it is, and the company believes that it is, and  
21 we believe that that's responsible for some of the  
22 commercial success that the products enjoyed. In the  
23 context of class, the point being that there will be  
24 a variety of different interpretations of what the  
25 terms at issue mean.



1           So for those reasons, that is our view of  
2 the case, a little bit distinct from what  
3 Mr. Schlesinger describes.

4           THE COURT: What is -- what is your  
5 position on the fact that it says, "No additives in  
6 our tobacco," and then it being, like, menthol added?

7           MR. MONDE: So menthol is added not to the  
8 tobacco but to the filter, and so it is not in the  
9 tobacco. It is additive-free tobacco, and this is  
10 very important, Judge. The descriptors  
11 "additive-free" and "natural" are tied to and refer  
12 to the tobacco, and that's an important distinction  
13 that sometimes gets overlooked.

14          THE COURT: All right. Anything else,  
15 Mr. Monde?

16          MR. MONDE: Nothing in terms of an  
17 introduction, and as I said, we have made some  
18 progress on some of the items of dispute in the  
19 26(f), and at the appropriate time, we can get to  
20 those.

21          THE COURT: All right. But you're  
22 comfortable with this order that they've presented on  
23 the management structure?

24          MR. MONDE: Reserving all rights as to any  
25 claims for fees and the reasonableness of the time,

1 yes.

2 THE COURT: All right. Thank you,  
3 Mr. Monde.

4 Mr. Schlesinger, Mr. Yanchunis, do you have  
5 any response, particularly maybe some concerns that  
6 Mr. Monde raised about the efficiency of your  
7 structure?

8 MR. YANCHUNIS: Again, Your Honor, you  
9 know, this case is by no means the largest case which  
10 I've been a co-lead or lead on. It dwarfs many of  
11 them, and again, my recent experience with Judge --  
12 in the Home Depot case where we had, as I mentioned  
13 to you, a leadership structure very similar to this,  
14 it was a very efficient method of managing people.

15 And already, prior to today, we've enlisted  
16 and charged certain responsibilities to certain  
17 members of the committee. All understand the need to  
18 reduce duplication, and we'll make certain of that at  
19 the time. I don't have any problem with the  
20 efficiencies of the leadership structure.

21 And let me just kind of give the Court this  
22 added assurance. On the plaintiffs' side of a class  
23 case, we work not based upon the hour. We work based  
24 upon the result. We do not get paid for our labor  
25 unless we are successful.

1           Inefficiencies do not arise in that type of  
2 context, because it doesn't make any sense for us as  
3 lawyers who need to produce a result in order to live  
4 and survive and to pay our overhead. That may not be  
5 the case on a defendant practice, and I -- as the  
6 Court knows from my resume, I was on the other side  
7 for many years. But on the plaintiffs' side, we tend  
8 to be a lot more careful about overloading issues.  
9 And again, I'm confident, with Mr. Schlesinger and  
10 Ms. Wolchansky at the helm, that we'll be able to run  
11 a very efficient ship.

12           THE COURT: All right. Thank you,  
13 Mr. Yanchunis.

14           Anything further, Mr. Schlesinger?

15           MR. SCHLESINGER: Briefly, Judge. May I --  
16 may I speak from here?

17           THE COURT: You may.

18           MR. SCHLESINGER: I agree with what  
19 Mr. Yanchunis says. My thinking on this was I  
20 brought the first case because I was so intimately  
21 involved in my regular trial activities, which are  
22 pretty busy down there in Florida -- I brought the  
23 first case particularly after the FDA said that this  
24 is a modified-risk tobacco product and they reflected  
25 on the voluntary labeling from the FTC to 2000 and

1 said, "But we're the FDA, and we've got authority,  
2 and we think you're in violation."

3 But I really encouraged those that came  
4 from the consumer class action side to join, and my  
5 concept was big ten. Because our experience in  
6 tobacco litigation is they are a formidable  
7 adversary, and they have tremendous manpower and  
8 resources.

9 And what we see in front of us today is  
10 often matched behind the scenes with a great deal of  
11 support staff and attorneys who are extremely  
12 talented. And so it does help to have the manpower  
13 to match the opponent. And for that reason, I  
14 thought, why not have a big group?

15 And I think that ultimately what we'll do,  
16 we'll all come through the top and the leadership  
17 structure we've proposed. And I think that it won't  
18 create confusion with our opponent, because we will  
19 be of like mind and present the opponent with a  
20 single planned approach. I don't see any reason why  
21 myself, John, and Melissa would ever disagree and put  
22 out separate ideas about how to proceed. We'll come  
23 to an agreement, and it'll always be a uniform  
24 approach, so I think it can be successful in that  
25 regard, Judge.

1 THE COURT: All right. Thank you,  
2 Mr. Schlesinger.

3 Ms. McGinn, anything further?

4 MS. MCGINN: Nothing, Your Honor.

5 THE COURT: All right. I have signed,  
6 then, the proposed order that the plaintiffs have  
7 presented, and I've given it to Ms. Wild for  
8 entering.

9 All right. Shall we take up, then, the  
10 scheduling? Do you want to tell me now the  
11 agreements that you've reached, or do you want me to  
12 go ahead and approve? As I indicated, most of these  
13 are acceptable to the Court. Do you want me to go  
14 through those and then, when we get to the ones where  
15 you disagree, before I blurt out anything, I wait and  
16 listen to see if you-all have reached agreement?

17 Mr. Monde.

18 MR. MONDE: Your Honor --

19 THE COURT: Do you have a better plan?

20 MR. MONDE: Oh, no, no. I was just going  
21 to come tell you where we've agreed.

22 THE COURT: Where you agree. All right.

23 MR. MONDE: We have agreed on the duration  
24 of the fact witness depositions as --

25 THE COURT: Take -- take me to the page in

1 your -- your joint status report.

2 MR. MONDE: It's the bottom of Page 16,  
3 Judge.

4 THE COURT: Sixteen. All right.

5 MR. MONDE: And the paragraph that begins,  
6 "Each deposition other than the 30(b)(6) deposition."  
7 We have agreed with the plaintiffs that, for fact  
8 witness depositions, setting aside a 30(b)(6) of the  
9 Defendant Santa Fe, setting that aside, it will be as  
10 represented here: Eight hours. And as we have  
11 explained both on the paper and informally with  
12 counsel, you know, good goes around, and  
13 accommodation goes around.

14 And so each side is going to need to  
15 accommodate a reasonable request to go beyond the  
16 eight hours where that is reasonable, and if we  
17 really come to a disagreement on that, in that  
18 unlikely event, we will seek assistance from the  
19 court.

20 THE COURT: So each defen -- each  
21 deposition, other than the 30(b)(6) of Santa Fe, will  
22 be limited to eight hours?

23 MR. MONDE: That's right. And then as to  
24 the 30(b)(6) portion, Judge, we've agreed that  
25 perhaps the better thing to do here is to defer

1 discussion of what is a reasonable time limit until  
2 the plaintiffs have had an opportunity to craft a  
3 30(b)(6) notice and we have an opportunity to discuss  
4 that with the plaintiffs. And at that point, I think  
5 we will all be in a better position to judge what  
6 constitutes a reasonable time limit.

7 THE COURT: All right. So that second  
8 sentence that follows, there's no agreement on that  
9 yet. We'll just --

10 MR. MONDE: That's -- that's --

11 THE COURT: We'll just defer that to  
12 another day?

13 MR. MONDE: Yes, sir.

14 THE COURT: All right. Does your agreement  
15 of eight hours, does it also include this  
16 parenthetical: "Excluding breaks and time used by  
17 counsel representing the witness to ask questions"?  
18 Does it include that?

19 MR. MONDE: Yes.

20 THE COURT: And then "unless extended."  
21 Your agreement includes the first sentence, correct?

22 MR. MONDE: That's right.

23 THE COURT: All right.

24 MR. MONDE: Down through 30(d)(1).

25 THE COURT: All right. What else? Have

1 you got some other agreements, or do others need to  
2 be decided?

3 MR. MONDE: I think the rest will need to  
4 be decided.

5 THE COURT: Okay. All right. Is that your  
6 understanding as well from the plaintiffs' side?

7 MS. WOLCHANSKY: That's correct, Your  
8 Honor.

9 THE COURT: All right. Let me just ask  
10 Ms. Wild something.

11 (The Court and the Clerk confer.)

12 THE COURT: All right. Let me orally give  
13 these, and then, of course, we'll put them in order  
14 just to make sure we're in agreement on all this.  
15 The plaintiffs shall file a consolidated amended  
16 complaint August 22nd, 2016.

17 The plaintiffs shall be allowed until  
18 December 2nd, 2016, to amend the pleadings for  
19 purpose of joining additional parties in compliance  
20 with the requirements of Rule 15. That doesn't  
21 change the requirements, so if you can do it as of  
22 right, you need to do it by right. If you need to  
23 move, you need to move, but it just sets a deadline  
24 for that.

25 And then the defendants shall be allowed 30



1 days following the filing of an answer to move to  
2 amend the pleadings and join additional parties.  
3 Again, it doesn't change the substantive requirements  
4 of 15(a). It just sets a deadline of when you have  
5 to do whatever you are allowed to do under 15(a).

6 All right. Let's go, then, to Page 11.  
7 This looks like the first place there may be a  
8 dispute. Let me get some education for you on the  
9 CEO Susan Ivey. Is that the CEO of Santa Fe, or is  
10 that the CEO of Reynolds? Who is this person?

11 Mr. Schlesinger.

12 MR. SCHLESINGER: Her name is Susan Ivey  
13 Cameron. She's currently -- her last name is  
14 Cameron. She's the CEO of Reynolds.

15 THE COURT: Okay.

16 MR. SCHLESINGER: But she was specifically  
17 communicated with by the FDA.

18 THE COURT: Let me -- let me throw out a  
19 proposal on this and see -- let me give you some  
20 dates, that what I'm toying with here is, turning to  
21 Page 12, your joint proposed case management, jumping  
22 ahead here, we're going to have the -- we're going to  
23 have a hearing on -- I'm going to set it, if this is  
24 okay with everyone, for -- hold on a second. This  
25 can't be right.

1 (The Court and the Clerk confer.)

2 THE COURT: So I was going to set a hearing  
3 on the defendants' motion to dismiss. This is a --  
4 this is Reynolds' 12(b)(1) motion -- or 12(b)(2)  
5 motion, for November 30th, 2016, at 9:00 a.m. I was  
6 wondering if this would work for everybody, if we  
7 just had an agreement that we won't depose Ivey --  
8 Susan Ivey before I have that hearing, and assuming I  
9 can get a prompt ruling to you out. And that way, if  
10 there's a debate about whether we're going to have a  
11 deposition of her, if she's an apex deposition or  
12 if -- I'll know how I'm treating it, and I'll know  
13 whether I'm treating it as a third party or I'm  
14 treating it as a party to the case.

15 Let me ask -- let me ask the plaintiffs  
16 first. Could you-all live with that: We don't  
17 depose her until I get it ruled, if I can have a  
18 prompt hearing on November 30th and then promptly  
19 give you a ruling?

20 MR. YANCHUNIS: Yes, Your Honor, that will  
21 work.

22 THE COURT: Will that work? Will that work  
23 for Reynolds?

24 MR. MONDE: It does, Your Honor, and just  
25 to be certain I'm understanding what the Court is

1 saying, the Court's not making any rulings about the  
2 propriety of the deposition. It's simply saying that  
3 the first thing it would like to resolve is the  
4 status of RAI.

5 THE COURT: Yeah, we just have an agreement  
6 that we just put Ivey down the road a little bit. We  
7 don't -- plaintiffs just don't notice her up  
8 tomorrow, and give us a little bit of time to rule on  
9 your motion. Then I'll know how I'm treating her  
10 when I get to this problem. If you-all can't work it  
11 out, I'll know whether I'm dealing with the CEO of  
12 Reynolds as a party or a CEO of Reynolds as a third  
13 party. That might inform the debate. It might not.

14 Yes?

15 MR. MONDE: That's fine, Your Honor.

16 MS. WOLCHANSKY: Judge, and we're okay with  
17 that with respect to Ms. Ivey, the only caveat being,  
18 with respect to the personal jurisdiction issue, we  
19 believe there may be discovery that needs to be  
20 conducted --

21 THE COURT: Right.

22 MS. WOLCHANSKY: -- on that issue. And so  
23 we want to reserve our right to conduct discovery in  
24 terms of what RAI's involvement was in the  
25 design/manufacture of the products, which we believe

1 will inform the Court as to whether RAI is the proper  
2 defendant and there is jurisdiction, Your Honor.

3 THE COURT: Yeah, and I wasn't putting any  
4 restriction on that, and then if you-all have  
5 problems with any particular deposition, then we can  
6 deal with it as it comes up.

7 MR. MONDE: Again, just for clarification,  
8 the defense position is that, until November 30th and  
9 the resolution of that motion, discovery directed  
10 specifically to RAI, not Santa Fe, but specifically  
11 to RAI would be limited to issues related to the  
12 personal jurisdiction issue.

13 THE COURT: How do the plaintiffs feel  
14 about that?

15 MS. WOLCHANSKY: It's our position that  
16 it's just premature at this stage to include that in  
17 the 26(f), that when we file the consolidated amended  
18 complaint, we identify which allegations we have,  
19 which causes of action we have, and we serve  
20 discovery. If, in fact, that discovery goes beyond  
21 the scope of what Mr. Monde and the defendants  
22 believe is appropriate, then we think that issue  
23 should be briefed and argued before the Court.

24 THE COURT: Well, let me leave it that way.  
25 I'm going to -- I'm going to try to -- you know, I'm

1 giving you a pretty quick setting, and so this should  
2 keep you busy for a while. I guess I would encourage  
3 the parties to focus on this point, on the personal  
4 jurisdiction, if it's directing discovery at  
5 Reynolds. But if there's a dis -- but I won't limit  
6 the plaintiffs to that, and I won't make a ruling  
7 that they're limited to that. And I'll just take the  
8 disputes as they come.

9 I think we have an agreement on what we're  
10 going to do with Ivey. Everything else is in game,  
11 but I encourage us to focus, in this short time we  
12 have left this year, to -- as far as discovery on  
13 Reynolds, maybe we can focus it on the 12(b)(2)  
14 motion that we know is coming.

15 Does that work for everybody?

16 MR. MONDE: Yes, sir.

17 THE COURT: We'll talk about how I handle  
18 discovery disputes in a moment, and we'll see if that  
19 works for you-all or if you-all need something  
20 different in this case.

21 The other thing I -- as far as the  
22 defendants' proposing to do discovery on unnamed  
23 proposed class members, I'll certainly do this, and I  
24 don't think I need to probably make any decision on  
25 that today and probably wouldn't want me to make a

1 decision without listening to it. And we'll see if  
2 we get to that point where that's a problem or an  
3 issue that I have to resolve, but I'll be receptive  
4 to it and won't make any judgment at the present  
5 time.

6           The plaintiffs seemed to indicate that  
7 they're going to do discovery before the class  
8 period. The defendants are -- indicate opposition to  
9 that. I guess, just as a general thought, you know,  
10 I'll keep an open mind when these issues come up and  
11 I have to resolve them, but I probably can't say  
12 today that discovery's going to be limited to the  
13 class period. I can think of some evidence that  
14 might be appropriate from prior to the class period  
15 that would need to be -- need to be allowed. So I'm  
16 not going to make any ruling on that today.

17           Let me ask the plaintiffs, looking at  
18 Page 11, is there anything else that I need to rule  
19 on or give guidance on before we move on to other  
20 pages?

21           MS. WOLCHANSKY: I think you've covered it,  
22 Your Honor.

23           THE COURT: All right. Mr. Monde?

24           MR. MONDE: No, Your Honor.

25           THE COURT: All right. Then let's go to

1 Page 12. I'll orally give these: May 31st, the  
2 parties to serve their Rule 26(a)(1) disclosures, and  
3 I guess -- well, I'll order what you have there.  
4 Does the May 31st -- today's the -- how does that  
5 work? It's disclosure within 14 days of the 26(f).

6 MR. MONDE: That was the basis for the  
7 date, Judge.

8 THE COURT: Has somebody got a phone? If  
9 you've got a phone, that's probably what's causing  
10 the microphone to do that. So if you've got a phone,  
11 you might move it away.

12 THE CLERK: Or if they've got a laptop  
13 connected to the Wi-Fi.

14 THE COURT: All right. Sorry to be dense  
15 here, but the May 31st date is what?

16 MR. MONDE: It's 14 days after the 26(f),  
17 Judge.

18 THE COURT: Okay. So you-all --

19 THE CLERK: They've agreed on the date.

20 THE COURT: You agreed on a date? Okay.

21 MR. MONDE: Yes, sir.

22 THE COURT: All right. Then that's what it  
23 ended up being. Okay. And then within -- so that'll  
24 be -- your disclosures will be due that date, and  
25 then within 30 days of filing the consolidated

1 amended complaint, the parties will serve amended  
2 supplemental disclosures, and the parties may begin  
3 to serve initial written disclosures. Is that also  
4 connected to the May 31st date? That's when you --  
5 that's when you can begin to do your initial  
6 disclo -- written discovery requests?

7 MR. MONDE: That was simply a date that the  
8 parties agreed to, Judge.

9 THE COURT: All right.

10 MR. MONDE: There was no particular magic  
11 to it.

12 THE COURT: All right. So that's when  
13 discovery will begin, I guess, on the written  
14 discovery.

15 August 22nd will be the deadline for the  
16 plaintiffs to file the consolidated amended  
17 complaint. September 21st, 2016, the parties to  
18 serve amended supplemental Rule 26(a) disclosures  
19 based on the consolidated amended complaint.

20 And then September 29th, 2016, deadline for  
21 defendants to file a motion to dismiss. August --  
22 October 31st, 2016, deadline for plaintiffs to file  
23 opposition to motion to dismiss. November 21st,  
24 deadline for defendants to file reply in support of  
25 the motion to dismiss. I'll set the hearing on the



1 motion to dismiss for November 30th, 2016, at  
2 9:00 a.m.

3 And then December 2nd, 2016, will be the  
4 deadline for the plaintiffs to amend the pleadings  
5 for the purpose of joining additional parties, in  
6 compliance with the requirements of Rule 15(a), which  
7 I already discussed a little bit earlier about how  
8 that's a -- that's a deadline. It doesn't change the  
9 substantive requirements of 15(a).

10 Then 30 days after ruling on the motion to  
11 dismiss, the defendants to answer consolidated  
12 amended answer, and then 60 days after ruling on  
13 motion to dismiss. That'll be the deadline for  
14 defendants to move to amend the pleadings and to join  
15 additional parties, in compliance with the  
16 requirements of Rule 15(a). And again, that's a  
17 deadline. It doesn't change the substantive  
18 requirements.

19 All right. On the discovery, let's see.  
20 Is there anything else on Rule -- let's see. Okay.  
21 Let me go to Page -- I left out some -- some stickers  
22 here.

23 All right. You have competing proposals  
24 regarding the deadlines related to class  
25 certification and experts. I guess, as a court, for

1 all the local lawyers, you're probably wondering when  
2 I have -- you know, when you can get your opinions  
3 from me and your cases in front of me, but  
4 nonetheless, I still like to humor myself that I move  
5 cases along. And so I guess I'm intrigued by the  
6 defendants' proposal that it moves things along a  
7 little faster than the plaintiffs, but usually, it's  
8 the opposite that I see.

9 So I guess I'll ask the defendants first.  
10 Mr. Monde, why do you care?

11 MR. MONDE: Efficiency is the reason.

12 THE COURT: Tell me why it hurts you to  
13 have it go on a few extra months that the plaintiffs  
14 propose.

15 MR. MONDE: More time for discovery when  
16 it's not really needed, in my experience, tends to  
17 generate disputes, and that's particularly true at  
18 the end of an overly lengthy discovery period.

19 THE COURT: Is there any magic to your  
20 deadline of August 23rd rather than theirs of  
21 June 20 -- yours of June 23rd and theirs of  
22 August 23rd?

23 MR. MONDE: Just this, Judge. The  
24 deadlines in ours were structured in the following  
25 way: That the plaintiffs would disclose their expert

1 witnesses and their reports, then they would move for  
2 class certification. The defense would then have an  
3 opportunity to depose the plaintiff experts, and then  
4 the defense would file their opposition to class and  
5 would disclose their experts and their reports. And  
6 then the same thing in terms of the -- setting up the  
7 reply brief, that any rebuttal witnesses designated  
8 by the plaintiff would be disclosed, deposed, and  
9 then plaintiff does their reply.

10           The reason, in our experience, that that's  
11 more efficient is that it ensures that the two sides  
12 are locked into their positions. Because what  
13 otherwise happens is that, in the motion for class  
14 certification, if it is delayed until after all of  
15 the experts have been deposed, the -- you get  
16 disputes about whether the motion is, in effect,  
17 asserting a new or a different claim by an expert.  
18 And that generates additional requests for  
19 depositions, or at least disputes about whether those  
20 depositions are necessary. So that is the theory and  
21 the purpose behind our structure.

22           In terms of the timing, we simply wanted to  
23 have adequate time for both sides to do that, and so  
24 we came up with this proposal. If the Court were  
25 inclined to follow our structure but to move things

1 so that the start of it was the date requested by the  
2 plaintiffs -- and let me be very specific. If the  
3 Court were to take our proposal, but instead of  
4 starting things on June 23rd, 2017, they were to  
5 start them on August 23rd, 2017, as the plaintiffs  
6 request, the defense would have no objection to that.

7 THE COURT: So when I look at the  
8 plaintiffs' proposed class certification, the biggest  
9 problem you have is below the August 23rd date,  
10 correct?

11 MR. MONDE: Yes, sir.

12 THE COURT: And would -- and where does  
13 your disagreement come into play first?

14 MR. MONDE: First of all --

15 THE COURT: They want their -- they want  
16 your expert witnesses disclosed first?

17 MR. MONDE: Yes, sir.

18 THE COURT: Okay.

19 MR. MONDE: Then secondly -- and that's the  
20 efficiency point. Then the point simply about  
21 timing, they suggest that we would get 60 days to  
22 disclose our experts after they disclose. We think  
23 90 is reasonable, and then with the --

24 THE COURT: Say that again.

25 MR. MONDE: Yes, sir. There's a 60-day --

1 approximately 60-day period after the plaintiffs  
2 designate their expert witnesses and give their  
3 reports to when the defense expert design --  
4 disclosures and reports are due, 60 days,  
5 thereabouts.

6 We believe that 90 days would be the  
7 appropriate time period between plaintiffs' and the  
8 defense disclosure. And then in addition, going a  
9 little bit farther down the page, on Page 13, whereas  
10 the plaintiffs propose that defense have 30 days in  
11 which to file an opposition to class certification,  
12 we believe that 60 days is appropriate. And that is,  
13 in fact, consistent with what the parties have agreed  
14 with regard to the motion to dismiss.

15 THE COURT: All right.

16 Yes.

17 MS. WOLCHANSKY: As an initial point, the  
18 plaintiffs do not have an issue with expediting the  
19 schedule or moving this along quickly. August versus  
20 June versus, you know, a date a bit even closer in  
21 time, we don't have an issue with that per se, so  
22 long as we can obtain the discovery that we need in  
23 order to retain experts, in order to move for class  
24 certification.

25 So our proposal -- and David and I

1 discussed this, you know, right before the hearing  
2 today to see if we could come closer to an agreement  
3 on this very schedule. And the biggest point of  
4 contention is we do not believe that we should move  
5 for class certification where we have the burden to  
6 prove that the class should be certified without  
7 having seen the defendants' experts and having the  
8 defendants have the ability to depose our experts  
9 without us knowing what's in their reports. We don't  
10 think that that's typical in a class case, and we  
11 don't think that that should happen here.

12 So in terms of tightening up the schedule,  
13 60 days versus 90 days --

14 THE COURT: So you don't want to file your  
15 motion until you've gotten through those depositions?

16 MS. WOLCHANSKY: That's correct, Your  
17 Honor.

18 THE COURT: Well, understanding that, do  
19 you think you really need to have your -- I guess I  
20 find it unusual to have the defendants' deadlines  
21 before the plaintiffs' deadlines. Have you got  
22 anything to say in support of that?

23 MS. WOLCHANSKY: The defendants' deadlines  
24 for?

25 THE COURT: Expert disclosures.

1 MS. WOLCHANSKY: No, we -- if that's in  
2 here, then that's a mistake.

3 THE COURT: Yeah, look at your  
4 October 25th. It's before the plaintiffs'.

5 MS. WOLCHANSKY: That's the rebuttal  
6 experts.

7 THE COURT: Oh, that's the rebuttal. Okay.  
8 I got you. All right.

9 MS. WOLCHANSKY: So we believe the proper  
10 schedule would be we disclose our experts and  
11 reports. The defendants disclose their experts and  
12 reports. We get to respond to those reports. The  
13 parties take depositions of the experts. We then  
14 move for class certification.

15 We can do Daubert briefing on experts and  
16 class certification at the same time, but that does  
17 not disadvantage the plaintiffs in having the  
18 defendants depose our experts without us knowing what  
19 their claims are and moving for class certification  
20 without having seen the defendants' expert reports.

21 We don't necessarily have an issue with 60  
22 days versus 90 days if the defendant needs more time  
23 to obtain their experts and get reports written. I  
24 think that that's in the details, but the structure,  
25 we feel, is important here and typical in class

1 cases.

2 THE COURT: All right. Let's set the date  
3 for the plaintiffs. It looks like I need to start  
4 at -- start with a date of setting the plaintiffs'  
5 disclosures, so I'll set it for August 23rd, 2017.

6 And then, Mr. Monde, why do you think -- I  
7 guess my experience has been that, if I just set an  
8 early deadline for the motion for class  
9 certification, I don't get a very -- I don't get much  
10 in it. Do you have any real problem with going ahead  
11 and having the discovery on the experts being before  
12 the plaintiffs file their motion for class  
13 certification? It seems like it'll be a more weighty  
14 and substantive motion if I do that.

15 MR. MONDE: Well, Judge, I would say that  
16 the purpose of the plaintiffs' reply brief would be  
17 to address issues that come up with depositions of  
18 the defense. And so it's not that we're excluding  
19 that, it's simply that the plaintiffs do have a  
20 burden with regard to class certification. It's a  
21 burden that they need to meet or not meet with their  
22 experts and not with defense experts.

23 And as I say, the issue that does come up  
24 and the structure that we're proposing is also  
25 common. I've seen it both ways, but the proposal



1 that we're making is common. And it -- and it's done  
2 with a practicality in mind, and that is to avoid  
3 something that ultimately postpones a decision on  
4 class certification and that specifically disputes  
5 about whether the briefing is modifying or asserting  
6 new expert theories which requires another round of  
7 depositions. That, we believe, is what commends our  
8 approach.

9 THE COURT: Well, I think I get a better  
10 motion if I get the discovery front end loaded, and  
11 you-all do this every day. Maybe you're right.  
12 Maybe I'd avoid issues, but it seems to me I would  
13 probably avoid them more if the discovery is before.

14 So I'm going to go with the plaintiffs'  
15 proposal on Page 13. August 23rd, 2017, will be the  
16 deadline for the plaintiffs' expert disclosures.  
17 Class experts, including written reports,  
18 October 25th, 2017, will be the -- now, did you --  
19 did you -- did you want to make a pitch for a longer  
20 period of time or a -- did you -- were you  
21 comfortable with that October 25th date if I'm going  
22 to require the defendants? Is this the one where you  
23 wanted a little bit long? How much do you have?

24 MR. MONDE: Just another 30 days, Judge, in  
25 other words.

1 THE COURT: Any objection to that from the  
2 plaintiffs?

3 MS. WOLCHANSKY: We don't have an objection  
4 to that, Your Honor.

5 THE COURT: All right. So November 25th,  
6 then, will become that date. Let's look at our  
7 calendar.

8 Do you want the day after Thanksgiving or  
9 do you want --

10 MR. MONDE: Sorry what you ask for, right,  
11 Judge?

12 THE COURT: Yeah.

13 MR. MONDE: If -- if -- if it would be a --

14 THE COURT: Why don't we at least make  
15 it -- go ahead. What were you going to say?

16 MR. MONDE: Make it the 28th.

17 THE COURT: All right. Any objection,  
18 plaintiffs?

19 MS. WOLCHANSKY: No, Your Honor.

20 THE COURT: All right. So it will be  
21 November 28th, and then you want the December  
22 deadline moved out 30 days?

23 MS. WOLCHANSKY: Yes, Your Honor.

24 THE COURT: All right. So that'll then put  
25 it January 6th. I need to get more pages on my

1 calendar. So it will be January 6th. All right.

2 So the defendants did not have a deadline  
3 for class certification expert depositions. The  
4 defen -- does defense have any problem with making  
5 it, say, March 1st, 2018?

6 MR. MONDE: No.

7 THE COURT: All right. Does that work for  
8 the plaintiffs?

9 MS. WOLCHANSKY: Yes, Your Honor.

10 THE COURT: All right. So it'll be  
11 March 1st.

12 All right. So then the motion will be  
13 filed -- plaintiffs' will be April 3rd, 2018. And  
14 all parties shall file any motions under Daubert.  
15 Let's see what the defendants said on this. Are you  
16 com --

17 MR. MONDE: We have -- we have no  
18 objection, Judge, to April --

19 THE COURT: No objection to that? So --

20 MR. MONDE: -- 3 being the deadline for  
21 class certification and Daubert motions.

22 THE COURT: Okay.

23 MR. MONDE: It's just the following date  
24 where that's the other point, where we asked for  
25 another 30 days, so that --

1 THE COURT: Do you have any problem with  
2 the plaintiffs moving that out 60 days for them --

3 MS. WOLCHANSKY: No.

4 THE COURT: -- to file a response?

5 MS. WOLCHANSKY: No, Your Honor.

6 THE COURT: So it'll be June, June 2nd.

7 And then do you want July 3rd, plaintiffs,  
8 July 3rd for your replies?

9 MS. WOLCHANSKY: Yes, Your Honor.

10 THE COURT: And then let's set a hearing,  
11 then, July 13th and 14th, 2018, for the class  
12 certification hearing.

13 You-all had a disagreement on  
14 supplementation under Rule 26(e)(1).

15 MR. YANCHUNIS: Your Honor, may I? Just a  
16 point of clarification --

17 THE COURT: You may.

18 MR. YANCHUNIS: -- in connection with that.  
19 So you've set one day for that?

20 THE COURT: I set two days, I thought.

21 MR. YANCHUNIS: Two days?

22 THE COURT: Do you think it needs more,  
23 less?

24 MR. YANCHUNIS: No, I just wanted to ask  
25 the practice of -- in a contested class cert., do you

1 entertain live testimony, or do you do it on the  
2 submission of declarations?

3 THE COURT: Well, I'll -- I'll let you run  
4 it any way you want.

5 MR. YANCHUNIS: Okay. Thank you, Judge.

6 THE COURT: I've had them both. If you  
7 want to put on a show with live witnesses, I'll let  
8 you do it. If you don't want it and you just want me  
9 to consider it on the papers, then I'll do it that  
10 way. But I've done it both ways.

11 MR. YANCHUNIS: Thank you, Judge.

12 MR. MONDE: And Judge, would those dates  
13 also be the time that the Court would hear argument  
14 on the Daubert motions?

15 THE COURT: Yeah, I'll tell you what  
16 I've -- what I'm doing right now in a class  
17 certification. I started with the Daubert motions  
18 the day of the class certification hearing, probably  
19 will take all testimony during that week or few days,  
20 and then in my class certification or in a separate  
21 opinion and order, I'll tell you whether I'm going to  
22 consider it or not or, in my class certification  
23 opinion, make rulings.

24 You know, you pretty much have to do these,  
25 or at least I think you do, with findings of fact and

1 conclusions of law and tell you what I'm doing with  
2 the testimony at that time. Does that seem to work?

3 MR. MONDE: Yes, sir.

4 THE COURT: Does that sound all right to  
5 the plaintiffs?

6 All right. You'd had a -- the plaintiffs  
7 wanted to have supplementation under Rule 26(e) 30  
8 days after the party discovers its disclosure is  
9 incorrect or incomplete, and you wanted it just by  
10 the rules?

11 MR. MONDE: The rule states seasonably,  
12 Your Honor.

13 THE COURT: Yeah.

14 MR. MONDE: Which, I mean, it just -- and I  
15 think the rule has that in there because  
16 circumstances differ. It's difficult and artificial  
17 to impose a specific time limit. Generally, 30 days  
18 is going to be seasonable, but the rule has that  
19 word. It reflects the wisdom of a lot of folks  
20 involved in crafting it, and that's why we would  
21 stand on it.

22 THE COURT: What's the plaintiffs' thoughts  
23 about the time?

24 MS. WOLCHANSKY: We don't feel particularly  
25 strongly on this point, Your Honor. We're

1 comfortable with your direction on this.

2 THE COURT: Well, let's start with the 30  
3 days. I -- it seems to me, as Mr. Monde points out,  
4 that's going to be enough time in most situations,  
5 and it'll probably be better to get this out. And if  
6 people need to get an extension for some reason, then  
7 I'll understand that, but let's try to comply with  
8 that.

9 All right. Have we covered every issue  
10 that needs to be decided on the class issue and  
11 expert witness deadlines? I guess then  
12 you're -- well, let me ask that.

13 MS. WOLCHANSKY: Yes, Your Honor.

14 THE COURT: All right.

15 MR. MONDE: Yes.

16 THE COURT: Okay. So then I will order  
17 that 60 days following the ruling on the class  
18 certification, the deadline for the Rule 56 motions  
19 for summary judgment will be 30 days -- or 60 days  
20 after the ruling, 120 days following the ruling on  
21 class certification, the deadline for briefs in  
22 opposition to the Rule 56 motion, and then 150 days  
23 following the ruling on class certification will be  
24 the deadline for reply briefs in support of the  
25 Rule 56 motions.

1           Turning to Page 16, you have an agreement  
2 in that last paragraph, first sentence, but it looked  
3 to me like you still had a disagreement on the number  
4 of depositions. Am I correct?

5           MS. WOLCHANSKY: That's right, Your Honor,  
6 and we tried to address this before the hearing as  
7 well. And the only difference, the plaintiffs have  
8 proposed 20 fact depositions of defendants, excluding  
9 any 30(b)(6) depositions, and the defendants'  
10 proposal just merely includes the expert depositions.

11           And the plaintiffs just aren't in a  
12 position at this point. We talked about it. We  
13 tried to resolve it, to limit the 20 any further  
14 without knowing how many depositions of experts we  
15 may need. We don't know how many experts the  
16 defendants will put forward. Certainly, if they had  
17 seven to ten, that would pinch us on fact  
18 depositions. So we'd like to keep those two numbers  
19 separate.

20           THE COURT: All right. It looked to me --  
21 and maybe I'm wrong. Maybe I'm not reading this  
22 right. You also had a disagreement on whether the --  
23 I mean, if I give 20 to each side, so 20 by the  
24 defendants, 20 by the plaintiffs, and you both  
25 exclude the 30(b)(6) depositions of the defendants



1 and then exclude the depositions of the named  
2 plaintiffs, are we in agreement on that so far, up to  
3 that point? It didn't quite --

4 MS. WOLCHANSKY: We would be fine with that  
5 proposal, Your Honor.

6 THE COURT: Okay. All right.

7 MR. MONDE: Given that I believe there are  
8 more than 20 named plaintiffs, a limit of 20,  
9 obviously, has to exclude depositions of plaintiffs.

10 THE COURT: Well, I think that's what I  
11 said.

12 MR. MONDE: Yes.

13 THE COURT: So it excludes 30(b)(6)'s. It  
14 excludes named plaintiffs.

15 MR. MONDE: Right.

16 THE COURT: And it's 20 for each side.  
17 We're in agreement on that?

18 MR. MONDE: Yes.

19 THE COURT: Up to that point?

20 MR. MONDE: Yes.

21 THE COURT: All right. I think that,  
22 probably, I need to go with the plaintiffs. Go  
23 ahead, if you've got any pitch to make on the  
24 experts, but it seems to me that guessing in the  
25 dark, that could eat up a lot.

1 MR. MONDE: I really don't. In fact, I was  
2 going to say that, obviously, if, at any point,  
3 either party feels that an excessive deposition  
4 number are being taken or that depositions are being  
5 taken that are not necessary, they, of course, have  
6 relief available to them under the rules. Let's  
7 operate under this proposal that excludes the experts  
8 for now until we get some better visibility in terms  
9 of the number of experts on both sides, and then  
10 we'll take it up if it becomes an issue.

11 THE COURT: All right. So it sounds like  
12 we're in agreement. Any other issues on Page 16 I  
13 need to deal with from the plaintiffs?

14 MS. WOLCHANSKY: No, Your Honor.

15 THE COURT: Defendants?

16 MR. MONDE: No.

17 THE COURT: All right. Discovery  
18 deadlines, the plaintiffs' proposal was 120 days, and  
19 the defendants would cut it off at the time of the  
20 reply. Any pitch you want to make for your proposal?

21 MS. WOLCHANSKY: Yes, Your Honor. We  
22 just -- discovery can't possibly end at the point of  
23 the reply brief for class certification, because we  
24 won't know whether Your Honor is going to certify  
25 this class. Certainly, depending on how the Court

1 rules on class certification, there may be additional  
2 discovery that needs to be conducted for trial.  
3 There may be -- may be additional experts that the  
4 plaintiffs need to retain in order to try this case,  
5 and to cut that off at the time of the reply, we  
6 simply don't think we can operate under that  
7 principle.

8 MR. YANCHUNIS: And if I might add -- I  
9 don't mean to double-team, Your Honor, but may I  
10 speak?

11 THE COURT: You may.

12 MR. YANCHUNIS: So I'm involved in a case  
13 called Pella 1, which is before Judge Zagel in the  
14 Northern District of Illinois. In that case, the  
15 court certified a nationwide class under declaratory  
16 judgment act and then certified six consumer statutes  
17 in six different states. That was upheld by the  
18 Seventh Circuit.

19 The case then was settled, and that  
20 court -- this was before I got involved in the  
21 case -- reversed that. And then new counsel came  
22 in -- Bob Clifford, myself -- and we've been engaged  
23 in discovery for the last two years. So we just  
24 recently hit discovery cutoff.

25 So that's a prime example of a case in

1 which the court certified a case, it was upheld on  
2 appeal, and we've been engaged in discovery for the  
3 last two years on the merits, with a trial setting in  
4 April of next year. So it's a circumstance and which  
5 I think well supports the extension of the discovery  
6 past the Court's ruling on the motion for class cert.

7 THE COURT: All right. Mr. Yanchunis.

8 Mr. Monde.

9 MR. MONDE: Your Honor, our position is --  
10 is that, under the current schedule, as I understand  
11 it, there will be -- the reply brief on class cert.  
12 won't be filed until April of 2018. That ought to be  
13 ample time to complete discovery.

14 We didn't say a hard cutoff. We said that  
15 it ought to be done, because we're not bifurcating  
16 discovery here: Class and merits. We've agreed not  
17 to do that. But if, as a result of Your Honor's  
18 class ruling, there are issues that need discovery,  
19 well, the first thing that will happen is the parties  
20 will confer and try to reach agreement. And if they  
21 don't, I expect that the plaintiffs will come forward  
22 asking for reopening of discovery to explore these  
23 additional topics, and I expect the discovery would  
24 then be limited.

25 But by setting a deadline for both parties

1 to work towards and given that that deadline is April  
2 of 2018, two years from now, that ought to be  
3 sufficient time. Again, because if we were not  
4 agreeing on the bifurcation issue, it might be a  
5 different situation. But here, merits discovery will  
6 go on in parallel with the class, and so we think our  
7 proposal is the one that will be most efficient.

8 THE COURT: Well, my experience has been,  
9 whether I grant or deny, it seems that there's always  
10 more discovery to do. So I'm going to go with the  
11 plaintiffs' proposal. 120 days after the Court rules  
12 on the motion for class certification will be the  
13 discovery deadline. As within seven days after the  
14 Court's ruling on the class certification, the  
15 parties will meet and confer regarding the completion  
16 of discovery, including but not limited to additional  
17 depositions, experts, and other discovery.

18 If the defendants feel like there's  
19 duplication or something else is going on, I'm going  
20 to talk to you about how I'm going to try to handle  
21 discovery disputes in a moment, but we'll -- we'll  
22 deal with it then. But I guess I think it probably  
23 makes sense to go ahead and build in some period of  
24 time, because it just seems like, even when I've  
25 denied class certification, it's the defendants often

1 that need discovery.

2 MR. MONDE: Understood, Judge. Given your  
3 ruling, I think we need to revisit back on Page 15 a  
4 bit, because the parties have jointly proposed that  
5 60 days following a ruling on class certification the  
6 defendant would make the Rule 56 motion. So I would  
7 propose that, instead of 60 days following the ruling  
8 on class certification, it would be 60 days following  
9 the close of discovery after class certification.  
10 And then the other dates would be amended  
11 accordingly.

12 THE COURT: Ms. Wolchansky, what do you  
13 think about that, pushing the summary judgment  
14 deadline a little bit further?

15 MS. WOLCHANSKY: We're fine with that, Your  
16 Honor.

17 THE COURT: All right. So we will then --  
18 let's -- let's -- I guess the change on Page 15 will  
19 be -- instead of saying 60 days following the ruling  
20 on class certification, it'll be 60 days following  
21 the discovery deadline.

22 MR. MONDE: Yes, sir.

23 THE COURT: And then 120 days and then 150  
24 days. All right.

25 And we will just leave for the future

1 pretrial conference till we get rulings on the  
2 motions for summary judgment, but the parties will  
3 request that, what they want and what I can do for  
4 you, at that point after the rulings on the motions  
5 for summary judgment.

6 Are there any other deadlines, any other --  
7 anything else I need to set for you, Ms. Wolchansky?

8 MS. WOLCHANSKY: Nothing further from the  
9 plaintiffs.

10 THE COURT: All right. How about from the  
11 defendants, Mr. Monde?

12 MR. MONDE: Nothing to be set, Judge, but I  
13 just wanted to bring to the Court's attention to be  
14 certain that we're all -- all three are on the same  
15 page, that the parties have proposed that we allow  
16 for an extension beyond the local rule page limit on  
17 the two briefs.

18 THE COURT: Yeah, I wasn't excited about  
19 that, but --

20 MR. MONDE: That's why I wanted to raise  
21 it, at least.

22 THE COURT: But I did see it. I did see  
23 it.

24 MR. MONDE: I didn't want you to see it  
25 after we had all gone.

1 THE COURT: Yeah, I know.

2 MS. WOLCHANSKY: Judge, one more point.

3 And I apologize, David. We haven't  
4 discussed this.

5 But it's our understanding there's a local  
6 rule -- rule that limits exhibits to 50 pages in  
7 total, which we -- the plaintiffs anticipate might be  
8 a problem if we are attaching depositions, and  
9 probably likewise for defendants. I don't know if --  
10 if Your Honor wants to have us address that when it  
11 comes up or if we can maybe just, here today, address  
12 that issue so we don't see multiple motions.

13 THE COURT: Well, just be generous with  
14 each other. I mean, I'm probably going to allow you  
15 to file what you want. I'll listen to what you have,  
16 so just be generous in giving extensions to each  
17 other.

18 Mr. Schultz.

19 MR. A. SCHULTZ: Your Honor, on that point,  
20 since our local rules unfortunately have a footnote  
21 which limits --

22 THE COURT: I didn't write it.

23 MR. A. SCHULTZ: Which unfortunately, Your  
24 Honor, I did, which, at the request of the clerk's  
25 office, converts 50 pages to a certain computer size.



1 THE COURT: Yeah.

2 MR. A. SCHULTZ: It may require an order  
3 from this Court in order to allow the clerk's office  
4 to -- for us to file more than the size. Because  
5 otherwise, the system automatically bounces anything  
6 that's over a certain computer period. This has  
7 nothing to do with our ability to work with each  
8 other and cooperate, but it may require some slight  
9 intervention from the Court.

10 THE COURT: Well, if you-all need help on  
11 that, just submit me an order. I'll almost always go  
12 along with it.

13 While we're talking about exhibits, as I  
14 get older and my eyes get weaker, a lot of times,  
15 these computer-generated highlights don't work, and  
16 it then forces me to read more than I am even being  
17 asked to read, just because I can't see it on the  
18 page. So just be mindful of that.

19 If you can figure out a way to test your  
20 CM/ECF filings to make sure that -- take it to your  
21 oldest lawyer. See if they can read it. Or  
22 underline it or figure out some bracketing or  
23 something like that. Underlining and bracketing  
24 actually -- I know it's old-school, but it actually  
25 works better for me as far as seeing than sometimes

1 highlighting.

2 But just test it maybe, because if I am  
3 being asked to read one sentence on a page and all  
4 that and I can't see the highlighting, I have to read  
5 the page. It does slow it down a little bit.

6 All right. Did I ask? Mr. Monde, did you  
7 have any other things on scheduling? Any sort of --  
8 anything else?

9 MR. MONDE: No.

10 THE COURT: I suggest we take a few  
11 minutes' break. We've gone fairly long, and I need  
12 to give Mr. Garrett a break to rest his fingers. And  
13 then we'll come back in, and I'll talk to you about  
14 how I do things, see if those need to be adjusted for  
15 this case. Then I do have a few questions I want to  
16 ask, just that in my reading, and then you-all may  
17 have some other things you want to ask me or tell me.

18 All right. We'll be in recess for a few  
19 minutes.

20 (Recess from 11:40 a.m. to 11:58 a.m.)

21 THE COURT: Please be seated.

22 All right. Let me -- let me make a few  
23 comments as I do for the local counsel. They've  
24 heard this many times, but let's see if it'll work  
25 for this case, these cases as well.

1           On discovery, I give you a choice. I find  
2   that most civil lawyers just need an answer, and if  
3   you would like to take advantage of that, call  
4   Ms. Wild, and I'll get on the phone with you and try  
5   to give you an answer. Sometimes I have to look at  
6   something, like an RFP or an interrogatory, to make  
7   an informed decision, so sometimes it takes two or  
8   three days. But usually, I can get back to you  
9   fairly quickly if I don't give you an answer on the  
10   phone.

11           If you would prefer to formally brief the  
12   discovery issue, that's fine as well. We'll talk  
13   about motions in a moment, and if you would prefer  
14   that Judge Fashing, the magistrate judge, handles  
15   discovery, that's fine with me as well. Just let  
16   Ms. Wild know, because if I don't hear from you, I'm  
17   my own default. I do my own discovery unless I hear  
18   otherwise from you.

19           On motions, you obviously have an  
20   obligation to meet and confer. That's required by  
21   the federal rules as well as the local rules. What  
22   I'm about to tell you is not required, but maybe with  
23   this bunch, since you-all litigate all over the  
24   country, it might mean something a little more than  
25   it seems to mean here, where I don't get many takers.

1 But if you would like for me to sit in on  
2 the meet and confers, I find when I do, issues sort  
3 of go by the wayside and we begin to focus on what  
4 really needs to be decided and what the judge needs  
5 to decide to do. So if you'd like to take advantage  
6 of that, just call Ms. Wild, and I'll get on the  
7 phone with you, or we can meet here or chambers,  
8 whatever, try to -- try to narrow the issues.

9 As you well know, a lot of the judges,  
10 particularly in the Southern District of New York, do  
11 that, and they're telling us that it resolves  
12 95 percent of the disputes. For some reason, I get  
13 few takers here in New Mexico. And so but if you-all  
14 would like to take advantage or try me out, let me  
15 know, and we'll do it. I don't require that like  
16 they do in the Southern District of New York.  
17 Federal court requires enough stuff, but if you'd  
18 like to take advantage of it, let Ms. Wild know.  
19 I'll make myself available.

20 Ms. Wild is very good at looking at the  
21 docket and figuring out what is being filed, but it  
22 does help, if you file something, to call her and  
23 say, "We filed this motion," and we'll try to set it  
24 promptly for a hearing, and then I'll try to either  
25 be prepared to rule or give you an inclination so I

1 can keep the case moving for you and keep it moving  
2 on my docket as well.

3 We talked about Daubert motions. Can you  
4 think of anything else?

5 THE CLERK: No.

6 THE COURT: All right. Let me go through a  
7 few things that I would go through with you if this  
8 were, sort of, a normal initial scheduling conference  
9 where you-all had not -- where we didn't do what we  
10 just have done, as going through, setting deadlines.

11 On experts, we've talked about the  
12 deadlines and all of that. But when I set the  
13 deadlines for experts, that means you have to  
14 disclose your experts, have your ex -- have -- you  
15 know, produce your expert reports and have your  
16 experts ready to be deposed. They don't have to be  
17 deposed that day, but have them ready to go so that  
18 the defendants can get to their work fairly quickly,  
19 and then on the other side, on the rebuttal side as  
20 well.

21 Let me just ask it. I assume, looking at  
22 the joint status report, probably what the answer  
23 will be, but do you want any assistance from our  
24 magistrate judges as far as a settlement conference,  
25 or do you want to just have them stand down? What

1 communication do you want me to give Judge Fashing?  
2 And if you don't want Judge Fashing, if there's  
3 somebody else in the building, somebody you'd like,  
4 somebody else in the district that you'd like, I can  
5 certainly run interference for it and make that  
6 happen.

7 MR. YANCHUNIS: Your Honor, could we defer  
8 that and allow us to talk internally and then also  
9 with Mr. Monde and his group --

10 THE COURT: Okay.

11 MR. YANCHUNIS: -- about the issue of using  
12 the magistrate or someone else?

13 THE COURT: All right.

14 MR. YANCHUNIS: Thank you, Judge.

15 THE COURT: Is that all right with you,  
16 Mr. Monde?

17 MR. MONDE: It is.

18 THE COURT: All right. So I will just not  
19 communicate with Ms. Fashing at all. So if you hear  
20 from her, you'll have to deal with her, and if you  
21 don't hear from her, then -- but I'm not going to  
22 communicate to her.

23 I can't read my writing here.

24 (The Court and the Clerk confer.)

25 THE COURT: All right. Let me ask you some

1 questions. Some -- sometimes in these larger cases,  
2 people want this. I don't want to impose it if you  
3 don't want it, but I've had people ask for it in some  
4 cases. In other cases, they don't. Do you want a  
5 status conference? Do you want me to set status  
6 conferences periodically?

7           You know, you could let me know 14 days in  
8 advance. If you don't have anything to discuss, we  
9 can vacate it so it's not a waste of everybody's  
10 time. Or do you want to just -- I'm pretty  
11 available. Do you just want to call me when there's  
12 issues and not have to worry with any sort of  
13 scheduled status conference?

14           And I guess the same question would be, do  
15 you want to give me a report, or do you want to just  
16 tell me when we get together? What's your  
17 preference?

18           MR. YANCHUNIS: Perhaps Mr. Monde and I  
19 can -- our group can talk with one another. You  
20 know, I will say that, in my district, where -- my  
21 home district, we never see a U.S. district judge.  
22 But in Chicago and Los Angeles, San Francisco and New  
23 York, that's rather routine. It does help you follow  
24 what we're doing.

25           So why don't Mr. Monde and I come up with

1 what makes sense -- 30, 60, 90 days -- or if, as you  
2 suggest, on the cusp of or eve of a date, if there's  
3 nothing to discuss, we can file a report. We could  
4 get back with you.

5 THE COURT: All right. Does that work for  
6 you, Mr. Monde?

7 MR. MONDE: It does.

8 THE COURT: All right. So we'll defer  
9 that, and you-all will tell me what you want. And I  
10 won't -- I'm not asking for those. I'm just trying  
11 to be of service here.

12 The same thing for the next question. Do  
13 the plaintiffs want to give me any sort of reports or  
14 anything on billing or hours or anything  
15 periodically, or do you -- do you want to just wait  
16 till the end?

17 MR. YANCHUNIS: Your Honor, again, we've  
18 agreed, and the Court has adopted that by an order  
19 that we're going to submit on a monthly basis by the  
20 15th of each month. It's up to you. We have no  
21 problem filing those in camera, and at the conclusion  
22 of the case, if we're successful, we will file a fee  
23 application. It is appropriate, in a number of  
24 districts, to have those records submitted in camera,  
25 so it's up to you.



1 THE COURT: All right. Well, let's don't,  
2 then.

3 MS. MCGINN: Okay.

4 THE COURT: Is that all right?

5 MR. YANCHUNIS: Your Honor, that's quite  
6 fine.

7 MR. MONDE: It is.

8 THE COURT: All right. I, at this point,  
9 have given up pleasure reading, and about all I read  
10 is court filings. So unless there's a compelling  
11 case to be made for it, let's not.

12 All right. We talked -- I made the offer  
13 of the prefiling conferences if you-all want to take  
14 advantage of that.

15 I need help with my handwriting.

16 (The Court and the Clerk confer.)

17 THE COURT: Oh, from the plaintiffs'  
18 standpoint, who is the point of contact for Ms. Wild  
19 to call?

20 MS. MCGINN: I would think that would be  
21 me.

22 THE COURT: You want it to be you?

23 MS. MCGINN: Yes.

24 THE COURT: Okay.

25 MS. MCGINN: I love talking to Ms. Wild.

1 THE COURT: Not to leave the defendants  
2 out, Mr. Schultz.

3 MR. A. SCHULTZ: I think it's me, Your  
4 Honor.

5 THE COURT: All right. It's a big country.  
6 There's a lot of lawyers from a lot of places. I  
7 talk to the phone a lot. It's a big state, so I get  
8 very used to telling -- talking to the phone. I  
9 know, when I was in private practice, I would drive  
10 all over the state and fly all over the country  
11 because I thought it made a difference. I have  
12 learned that I can tell people know just as well over  
13 the phone as in person.

14 So do what you want. You're always welcome  
15 to come to Albuquerque, but also, feel free to use  
16 the phone. A little rule on the phone, please give  
17 Ms. Wild 24 hours' advance notice before you use the  
18 phone.

19 And this probably is more applicable to the  
20 defense coun -- the plaintiffs' counsel. If, for  
21 example, Ms. McGinn, you're going to appear by phone  
22 and you find out Mr. Bienvenu is also going to appear  
23 by phone, don't give him the number and then him not  
24 tell Ms. Wild that he's not calling by phone.

25 MS. MCGINN: Okay.

1 THE COURT: And the reason for that is  
2 because our phone system does have some limitations.  
3 So we do have to plan whether we're dealing with a  
4 conference call or just a -- just our usual call-in  
5 system. So this is a lot of people, and we'll  
6 accommodate, but we do need to know in advance.

7 If you could stand next to me and tell me  
8 what I wrote here.

9 MS. MCGINN: Your Honor, I'll be the  
10 contact person for Ms. Wild if she'll come to my  
11 office and help me read my handwriting, too.

12 (The Court and the Clerk confer.)

13 THE COURT: Oh, I do want every motion  
14 that's filed to indicate precisely what the position  
15 of any parties, and this is probably more of an issue  
16 for the plaintiffs. So if the lead counsel has been  
17 given authority by all the plaintiffs, then make the  
18 representation that you have the consent or the  
19 concurrence of all plaintiffs. But I'm going to put  
20 that burden on you-all.

21 So I don't care how you get it. So if  
22 you-all, in your working together -- but I need it.  
23 So don't -- just -- just if somebody, for some  
24 reason, does something in one case or something like  
25 that. And I don't care how small it is. So I

1 want -- I want the position of all parties when a  
2 motion is filed. And so I'll leave it to the  
3 plaintiffs to figure out how that's done, but put in  
4 there if everybody consents and if somebody doesn't  
5 consent.

6 I'm going to ask you in a moment if I can  
7 impose upon the parties -- if you're agreeable to  
8 this. If you're not agreeable, we can put it  
9 together. But we're going to put a case management  
10 order together following today's hearing, and I'm  
11 going to put in here -- or you're going to put in,  
12 depending on who's going to draft the order, that  
13 these deadlines apply to all new parties and new  
14 cases. We'll put a sentence in there that, if  
15 somebody else comes into the case, they can certainly  
16 move for relief, but for the present time, this --  
17 this is going to apply to all parties.

18 I do have a case management order out of  
19 the Manual for Complex Litigation 40.21. That is  
20 what I intend to use, rather than my, sort of, usual  
21 scheduling order for this case. I would request --  
22 although if you don't want to do it, we'll do it --  
23 you putting this together, showing it to each other,  
24 and then submitting it to the Court with the  
25 deadlines that we agreed on. Does that sound

1 reasonable?

2 MR. YANCHUNIS: Yes. Would it be  
3 appropriate if the plaintiffs take the laboring oar,  
4 and then, obviously, upon the preparation of that, we  
5 can have the defendants' input?

6 MR. MONDE: Absolutely.

7 THE COURT: All right. So there's the  
8 form, and if you-all will submit that.

9 One minute more with Ms. Wild.

10 (The Court and the Clerk confer.)

11 THE COURT: All right. I'm about done.  
12 Let me just mention one thing. Be patient with us.  
13 We're about to go into a month-long trial on  
14 June 6th. Mr. Schultz knows, and then I come right  
15 out of that, and I've got a firm setting and probably  
16 a criminal case in July. So I have this month-long  
17 trial that's coming up, and then I've been assigned a  
18 death penalty case that has 23 death penalty eligible  
19 defendants, 41 defendants and 48 lawyers.

20 And so this is kind of an intense time  
21 around here. So be patient. We'll try to serve you  
22 as well as we possibly can, but we do have kind of a  
23 busy time that we're going through right at the  
24 present time.

25 I think that is all that I need to discuss

1 with you. That's all I need to tell you. Is there  
2 anything else we need to discuss while we're  
3 together, anything else I can do for you today?

4 Mr. Yanchunis.

5 MR. YANCHUNIS: Just one thing, Your Honor.  
6 You mentioned some problems reading things. It is --

7 THE COURT: It's not -- it's not as bad as  
8 I maybe put on, but --

9 MR. YANCHUNIS: Well, it's certainly bad  
10 for me, and I've continued to move up in the strength  
11 of these readers. And I ascertain that it is not the  
12 local practice here to submit bench copies of what is  
13 filed electronically. Some judges like that. Would  
14 you not want those?

15 THE COURT: You know, it's just -- it's too  
16 much work.

17 MR. YANCHUNIS: Okay.

18 THE COURT: I'm fine. I'm fine. I  
19 appreciate it.

20 MR. YANCHUNIS: Yes, sir.

21 THE COURT: But I need to drag into the  
22 21st century with CM/ECF, and I'll get there. I'll  
23 get there. But I appreciate it.

24 Mr. Monde.

25 MR. MONDE: Judge, one item. In your order

1 setting this conference of May 2nd, Paragraph 2H on  
2 Page 6, you said that no motion shall be filed under  
3 Rule 12, among other rules, without leave of court.

4 THE COURT: Right.

5 MR. MONDE: Can we interpret the Court's  
6 rulings today as leave of Court to file the motion to  
7 dismiss with regard to RAI and the personal  
8 jurisdiction issue and the motion based on preemption  
9 and other grounds?

10 THE COURT: You may. I assume there's no  
11 objection to that.

12 MR. YANCHUNIS: Of course not, Your Honor.

13 THE COURT: Okay.

14 MR. MONDE: Thank you.

15 THE COURT: Anything else, Mr. Monde?

16 MR. MONDE: That's it, Your Honor.

17 THE COURT: I do think I left one thing  
18 off. I found another little list here, so let me go  
19 through my list to see if I've covered everything.

20 You-all gave me a summary, and of course, I  
21 read everything as well. And we got -- we got the  
22 12(b)(2) motion coming up, but is there a -- is  
23 there -- is there some motion or issue in this case  
24 that the preemption issue or something like that, is  
25 there some key issue here that, if it was pulled

1 forward, would assist the parties in trying to  
2 resolve this case? Is there some key issue here that  
3 can be done sooner rather than later?

4 How about from the plaintiffs' standpoint?

5 MS. MCGINN: Your Honor, I don't think so.  
6 The history, why the historical aspect of all this is  
7 important, is because Tobacco doesn't settle. If  
8 there's -- you're asking, is there something that  
9 would get the cases resolved? I don't think that's  
10 the case here. Our plan is to get the case ready for  
11 trial, because that's where we think it's going to go  
12 eventually, so --

13 THE COURT: Well, as you know, I've sat on  
14 both sides of this table.

15 MS. MCGINN: Right.

16 THE COURT: If there's some big issue out  
17 there that is going to -- is going to be there, I  
18 want to know the good news and bad news earlier  
19 rather than later. There's not one of those issues  
20 here, --

21 MS. MCGINN: I don't think so.

22 THE COURT: -- the preemption issue or  
23 something?

24 MR. SCHLESINGER: Obviously, class  
25 certification is --



1 MS. MCGINN: Right.

2 MR. SCHLESINGER: -- a huge matter, and  
3 if -- if, hypothetically, Your Honor certifies a  
4 class, we're faced with a 23(f) immediate appeal on  
5 the propriety of that ruling. So that's -- that's  
6 all -- in addition to the at -- the schedule you've  
7 laid out that gets us into 2018, even if we were to  
8 prevail, that's going to add substantial time for the  
9 appellate courts to assess the propriety of Your  
10 Honor's ruling. So --

11 THE COURT: For you -- for you, it's the  
12 class certification hearing that's --

13 MR. SCHLESINGER: It is.

14 THE COURT: -- that's the ball game?

15 MR. SCHLESINGER: It is, and I'm sure for  
16 defense that -- that, you know, they've got interest  
17 in dismissal and preemption, and those precede  
18 things. But you know, we're going to try to move  
19 expeditiously, and we're going to try to provide what  
20 we can ahead of time to keep this moving.

21 THE COURT: All right. How would you  
22 answer that question, Mr. Monde?

23 MR. MONDE: Preemption is certainly a key  
24 issue that now we know, based on the Court's setting  
25 the schedule, will be resolved relatively early, and

1 that, to us, is an important decision and could well  
2 be dispositive. Don't know, of course, until we see  
3 the consolidated amended complaint.

4 THE COURT: Well, you've got -- you've got  
5 the deadlines. Do you anticipate bringing that  
6 motion -- the preemption issue earlier rather than  
7 later? Or is that --

8 MR. MONDE: Well, there's a -- there's a  
9 deadline that's been set. I don't anticipate  
10 bringing that motion earlier than the deadline simply  
11 because there is a lot of other work to be done. If  
12 the Court is encouraging us to do that --

13 THE COURT: No, I'm not. I just -- I just  
14 wondered. I'm just trying to get a feel for the real  
15 world now here: What are we really fighting over?  
16 Class certification seems to be the ball game over  
17 here. You're saying the preemption issue. I'm just  
18 trying to get a feel for, before it all starts,  
19 what -- what's the real ball game here.

20 MR. MONDE: Well, in our view, preemption  
21 is the first test that the plaintiffs' claims need to  
22 be put to, and in addition, of course, to the RAI  
23 personal jurisdiction motion. If, for whatever  
24 reason, the Court denies the motion on preemption or  
25 perhaps grants it as to certain claims, that will

1 then help all of us to focus on what's important  
2 going forward.

3 THE COURT: Now, it seems to me the  
4 deadlines we've set pushes that motion to dismiss  
5 very far down the pike. Am I -- am I --

6 MR. MONDE: Well, I guess it's all in the  
7 eye of the beholder, but it's September. The motion  
8 to dismiss both on jurisdiction and on preemption and  
9 related arguments is September 29th.

10 THE COURT: So that's our November 30th  
11 hearing.

12 MR. MONDE: Well, in other words, the  
13 Court --

14 THE COURT: So I'll have those two issues  
15 on November 30th.

16 MR. MONDE: That's right. You'll hear both  
17 on that -- on that day, and you know, we -- I haven't  
18 conferred with my colleagues on the other side in  
19 terms of estimated length of time, but I would think  
20 that could take the better part of a day, those two  
21 arguments.

22 THE COURT: What did we give? Did we give  
23 one day or two days on that?

24 MR. MONDE: One currently, and I'm not  
25 suggesting we need two, Judge. I think --

1 THE COURT: Well, as you get -- if you get  
2 closer and you think you do, call Ms. Wild. So I'm  
3 going to be looking at two issues on that day.

4 MR. MONDE: That's right.

5 THE COURT: Jurisdiction and preemption,  
6 those will be the two big issues.

7 MR. MONDE: Yeah. Yes, with the  
8 understanding that, in addition to preemption, there  
9 may be other grounds to dismiss, either on a partial  
10 or a complete basis. I don't want to leave the Court  
11 with the impression that preemption is the only  
12 argument that it might see on the 30th.

13 THE COURT: Okay. There are three pending  
14 motions in -- there's one in the -- there's motions  
15 to dismiss in the Brattain case, the Sproule case,  
16 and the White case. They are pending. I assume  
17 you-all filed them.

18 MR. MONDE: We did, Judge, and the stays  
19 were entered in those cases before responsive  
20 briefing was done. I don't think that there was a  
21 motion filed in the White case, because that was  
22 filed -- the White case was actually filed just on  
23 the eve of the hearing out in Santa Barbara on the  
24 MDL. But you're correct that they were in the  
25 Sproule and the Brattain case. Now that we have

1 agreed that there will be a consolidated amended  
2 complaint filed for pretrial purposes, obviously, our  
3 motion will be directed towards that.

4 THE COURT: Do you want to withdraw those  
5 three motions or two motions or whatever motions you  
6 have and then just -- then we just have the one  
7 that's coming or the -- the two that are coming or  
8 however many you're going to file?

9 MR. MONDE: Yes, with the -- with the  
10 understanding that we are withdrawing those on the  
11 assumption and belief that the plaintiffs will be  
12 filing a consolidated amended complaint and we will  
13 have an opportunity to move to dismiss against that.

14 THE COURT: Any objection to withdrawing?

15 MS. MCGINN: No.

16 THE COURT: All right.

17 MR. YANCHUNIS: And that would be  
18 appropriate.

19 THE COURT: All right. So you don't need  
20 to file another motion. Just file a notice  
21 indicating that all the -- everybody agrees, just  
22 withdrawing those motions.

23 MR. MONDE: And we'll look at what's on the  
24 White docket so we can understand that.

25 THE COURT: It's not.

1 MR. MONDE: Okay.

2 THE COURT: So --

3 MR. WARSHAW: Your Honor, this is Dan  
4 Warshaw for White. It was not filed in my case.

5 THE COURT: Yeah. Yeah, Ms. Wild has just  
6 confirmed that. So it's Brattain and Sproule, then.

7 MR. MONDE: Yes, Judge.

8 THE COURT: All right. Anything else,  
9 Ms. McGinn?

10 MS. MCGINN: Nothing from the plaintiffs,  
11 Your Honor.

12 THE COURT: Mr. Monde?

13 MR. MONDE: Nothing from defendants.

14 THE COURT: All right. Appreciate your  
15 presentations and presence today.

16 If we can be of assistance, don't hesitate  
17 to call. I'll try to help you litigate this case as  
18 expeditiously and inexpensively as possible. If you  
19 agree on anything, you know, probably I'll go along.  
20 So it's not like a criminal case, where I have to  
21 sometimes make up my own mind. But if you agree to  
22 change any of this or anything, just submit me an  
23 order. And if you can't agree, don't feel like you  
24 have to brief it all up. Call Ms. Wild and get me on  
25 the phone.

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All right. Good to see you-all.

MR. SCHLESINGER: Good to meet you, Judge.

THE COURT: I look forward to working with  
you.

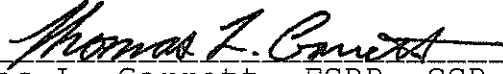
(In recess at 12:22 p.m.)

## REPORTER'S CERTIFICATE

I, THOMAS L. GARRETT, Court Reporter for the State of New Mexico, hereby certify that I reported the proceedings in 1:16-MD-02695-JB-LF and that the pages contained herein are a true and correct transcript of the proceedings.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 27th day of May 2016.

  
Thomas L. Garrett, FCRR, CCR #255  
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